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THE RIGHT TO BE TRIED WITHIN A REASONABLE TIME

by

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DEDICATION

To my mother and the memory of my father; two loving, caring human beings who devoted their lives to healing the sick.

ABSTRACT

On April 17, 1982, Canada proclaimed the Canada Act, 1982. Contained within it was the Canadian Charter of Rights and Freedoms. One of the rights contained within was s.11(b), which reads as follows:

> s.11 Any person charged with an offense has the right
>
> (b) to be tried within a reasonable time;

What did this right extend to Canadians? To answer that, the following framework has been developed. The first chapter will introduce the Canadian pre-Charter jurisprudence. An attempt will be made to determine three issues. The first will be to show that undue delay in criminal proceedings has been a factor in dismissing or staying charges. Secondly, the actual time frame considered by these cases is invaluable in determining what a reasonable time is in which to prosecute, and sets a Canadian standard in which to measure delay. The third will be to show the absolute confusion in this area of the law.

The second chapter will summarize the American and European Convention for the Protection of Human Rights and Fundamental Freedoms jurisprudence. As it is clear that certain sections of the Canadian Charter were derived from

the Convention, it is a valuable precedential resource. Another reason for analyzing the Convention is that its two official languages are French and English. Certain problems which will be faced in interpreting our Charter have already been interpreted under the Convention. In particular, the word "trial" has been the subject of well-reasoned judgments. The American jurisprudence on the right to a speedy trial will also be summarized. It will be limited to a discussion of the Sixth Amendment right, as well as to United States Supreme Court decisions. The source is valuable for two reasons. The first is that it enunciates the goals of the right as well as the evils it is attempting to combat. Secondly, it offers a treasure trove of learned dissents and scholarly works.

The third chapter will be devoted to a word by word analysis of section 11(b). This will include how the section has been interpreted to date, as well as a synthesis of how it should be interpreted. Assistance in this endeavour comes from the other jurisdictions as well as the Special Joint Committee on the Constitutiion of Canada Proceedings, which examined and questioned the drafters of the Charter to discover its intent.

Finally, the fourth chapter will summarize the major conclusions of this thesis.

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CHAPTER I

THE PRE-CHARTER JURISPRUDENCE

A. Introduction

The right to be tried within a reasonable time extends to any person charged with an offence. This thesis will concern itself with a determination as to how this right should be interpreted considering its goals. The analysis shall center on the policy arguments supporting the right. The thesis will develop broad guidelines for the right's interpretation using the following framework.

The first chapter will be devoted to the Canadian pre-Charter jurisprudence on the doctrine of abuse of process. Two discernable trends appear throughout this review. The first is that delay in criminal proceedings has constituted grounds on which the courts have entered stays or ordered prohibition or certiorari to end the proceedings. This power has been exercised throughout the past thirty years under the rubric of "abuse of process". It has further been exercised in spite of the fact there is no statutory or legislative basis for such a power.

The second trend that develops out of the Canadian pre-Charter case law is that the lower courts have led the way in invoking the doctrine of abuse of process. This trend has occurred in spite of the fact the Supreme Court of Canada raised doubts concerning the existence of the abuse of process doctrine in Rourke v. The Queen.[1] Delay has been a contributing factor in the application of this doctrine; in spite of the fact the Supreme Court of Canada ruled out its significance in Rourke.

The pre-Charter case law also serves to establish a rough "guide-post" as to what constitutes "a reasonable time". The cases that have considered the delay issue offer assistance in establishing the Canadian context. As will be evident further on in this thesis, the other jurisdictions under review offer no assistance in establishing the actual time frame. The other jurisdiction's investigatory and criminal proceedings extend the time period well past the boundaries of the Canadian context.

Chaper II will summarize the relevant jurisprudence under the European Convention for the Protection of Human Rights and Fundamental Freedoms and the United States Sixth Amendment. The European Convention jurisprudence is a valuable precedential source for a number of reasons. First, it is clear from the explanatory notes accompanying the October 5th, 1980 draft of the Charter that s.11(b) was drawn from the provisions contained in the European Convention and the International Covenant on Civil and Political Rights.

Secondly, both the Convention and the Charter use the term "reasonable time." Finally, the Convention, like the Charter, has two official and equally authoritative languages; French and English. The problems that arise when both the English and French versions are juxtaposed have been dealt with by the European Court. The Convention case law offers assistance in reconciling the two.

The United States Sixth Amendment guarantee of a right to a speedy trial will also be addressed. The review will be confined, in the most part, to the United States Supreme Court decisions. This is not to suggest that there is little value in reviewing State Supreme Court decisions. Protection against undue delay in the United States is not only offered by the Sixth Amendment, but also by federal statute, State constitutions and statutes of limitation. A review of this material, as well as State Supreme Court decisions, is outside the scope of this thesis.

The reasons for reviewing the American case law are two-fold. To begin with, the cases clearly enunciate the goals of the speedy trial right and the evils it was meant to combat. Further, they offer numerous learned dissents and scholarly works on the subject.

Chapter III will be devoted to a detailed analysis of s.11(b). Such a review will examine how the section has been interpreted to date, as well as how it should be interpreted based on the goals underlying the right to a trial within a reasonable time and the policy reasons associated with the implementation of the right. Assistance in this endeavour comes from the other jurisdictions as well as the Special Joint Committee on the Constitution of Canada Proceedings, which examined and questioned the drafters of the Charter to discover its intent.

The admissibility of the Joint Committee's proceedings is an issue that is yet to be determined. Belzil, J. A., speaking in dissent in R. v. Big M. Drug Mart,[2] refers to a House of Commons speech made by former Prime Minister John G. Diefenbaker on the Canadian Bill of Rights. Belzil, J. A., referred to the speech as disclosing the intent of the legislation.[3]

The leading case on the admissibility of extrinsic evidence is the Supreme Court of Canada decision of Reference Re Anti-Inflation Act.[4] Extrinsic evidence was considered in the form of a federal government white paper, Statistics Canada bulletins, a study by an economist, telegrams sent by other economists supporting the study, and a speech by the

Governor of the Bank of Canada.[5] The Court cited with approval Lower Mainland Dairy Products Board et al.[6] where Taschereau, J., speaking for the majority of the Supreme Court of Canada, stated that:

> In certain cases, in order to avoid confusion extraneous evidence is required to facilitate the analysis of legislative enactments, and thus disclose their aims which otherwise would remain obscure or even completely concealed.[7]

The Lower Mainland Dairy Products Board case supports the proposition that evidence such as Joint Committee proceedings is admissible. However, it was made clear by Laskin, C. J. C., in Reference Re Anti-Inflation Act that the extrinsic material was admissible as it bore on the circumstances in which the legislation was passed, and was used to determine whether the legislation rested on a valid constitutional base.[8] Laskin, C. J. C., continued:

> There is no issue in this case as to the meaning of the terms of the legislation nor, in my opinion, is there any issue as to the object of the legislation.[9]

Laskin, C. J. C., concludes by stating that the extrinsic material was properly considered as it was directed to the question of whether the social and economic circumstances were such as to provide support for the passage of the Act.[10]

The Joint Committee's proceedings would be valuable in clarifying the meaning of s.11(b) of the Charter. Although the question remains open as to whether or not the courts will accept this extrinsic material, the two Supreme Court of Canada decisions just cited should provide authority for consideration of the Joint Committee's proceedings.

As was stated earlier, the thesis will concentrate on developing interpretations based on the right's goals. It should be noted that numerous provisions in the Criminal Code may be in conflict with s.11(b). The statutory power given to the Attorney General pursuant to ss. 508(1) and (2) and ss. 732.1 (1) and (2) of the Code, which allows him to enter a stay and recommence the proceedings at any time within one year may well violate s.11(b). The authority given the court under s.472 of the Code is equally problematic. There, the court may remand a witness in custody who refuses to be sworn or answer questions put to him for no longer than eight days. However, the court may continue to remand and adjourn the matter until the witness consents to do what is required of him. The question then arises as to how many remands are reasonable? Further, as neither party is responsible for the delay, how is the delay to be treated? Even more problematic are the Code provisions relating to persons unfit to stand trial. Under s.543 and s.545, an accused may well remain "charged" for a number of months or years while remaining classified as mentally unfit to stand trial. How can these provisions be reconciled with s.11(b)?

These considerations along with other statutory provisions which may violate s.11(b) will not be examined in detail. This thesis attempts to establish principles of interpretations based on the evils the right purportedly protects against. The principles may then, in turn, become a basis for the resolution of the problems noted above.

B. The Historical Roots of the Right

Before starting with the twentieth century Canadian case law on abuse of process and laches in criminal proceedings, a brief look at the historical development of the right is in order. As U.S. Supreme Court Chief Justice Warren pointed out in Klopfer v. North Carolina, it's "first articulation in modern jurisprudence appears to have been made in Magna Carta (1215)".[11] Further, he notes that an even earlier recognition of the right to speedy justice is to be found in the Assize of Clarendon (1166), wherein instructions were given to sheriffs to proceed more hastily with delivery of prisoners to the nearest justice.[12] As the learned Chief Justice further notes:

> By the late thirteenth century, justices, armed with commissions of gaol delivery and/or oyer and terminer were visiting the country-side three times a year.[13]

In Tarnopolsky's book The Canadian Charter of Rights and Freedoms (1982), the author comments that:

> Since the end of the seventeenth century, British courts have stressed that one of the two objectives of the Habeas Corpus Act, 1679 was to give the defendant a procedural means to counter lengthy delays while awaiting trial.[14]

Other legislative attempts were made to speed up the criminal law process, including An Act of William III, passed in 1701, entitled "An Act for Preventing Wrongous Imprisonment and Against Undue Delay in Trials".[15] The drafters of the first colonial bills of rights set forth the principle of a "right to a speedy trial".[16]

While the English law was developing in this area, a basic maxim was working against the development of protection against prosecutorial laches or delay, and that was "nullum tempus occurrit regi [or] No time bars the King in seeking a remedy against his subjects".[17] In United States v. Marion,[18] the Court, after an apparently exhaustive search, came up with only four cases where prosecutorial laches was a bar to further proceedings.[19] The term "laches", as it is used in these early English cases, implies inordinate delay or prosecutorial derelict. "Laches" receives no concrete definition; it appears to be defined by the facts of the case. Perhaps because of the lack of English precedent dealing with the problem of delay, we do not find the Canadian courts dealing with the issue until the latter part of the twentieth century.

C. Canadian Pre-Charter Jurisprudence Relating to Trial Within a Reasonable Time

Beginning with the turn of the century, the Canadian cases with respect to trials within a reasonable time often focused on being put to trial unreasonably soon. In R. v. Lorenzo,[20] the court held that the setting of the trial date only hours after arrest and failing to grant a brief adjournment to contact witnesses was unreasonable. In R. v. Luigi[21] however, the court held that one clear day between arrest and trial was sufficient, even though defence counsel had only met the accused the morning of the trial.

However, in R. v. Lee Sow,[22] the court quashed a conviction and overturned a five-year prison sentence after a unilingual Chinese speaking man was refused a brief adjournment to speak to his cousin. He was arrested, arraigned, tried and convicted all in the same day. In R. v.

Hallchuk,[23] the magistrate refused an accused's request for an adjournment although the accused's counsel informed the magistrate he could not be present. The accused was arrested, charged and brought to trial on the same day. As well, he had a poor command of the English language. The accused's appeal was successful, as the court held that the accused was denied the right to full answer and defence.

The later cases began to deal with the problem of unreasonable time as a result of delay. The three cases that will be focused on are R. v. Osborn,[24] Rourke v. The Queen,[25] and R. v. Krannenburg.[26] These three cases were decided by the Supreme Court of Canada, and comprise the Canadian abuse of process trilogy.[27] While only Rourke specifically considers delay, both Osborn and Krannenburg are important in that they deal with the existence of the abuse of process doctrine. Without this doctrine, there is no power to control delay.

The four cases on topic before Osborn left the issue of whether criminal courts had the power to control their own process in light of an abuse of process resulting from delay in question. While a three month pre-charge delay was held to impair the accused's right to full answer and defence,[28] a pre-charge delay of four months was not.[29] While a case adjourned five times was not held to be abusive,[30] a delay of two years, three months was, with certiorari issuing to quash the committal.[31] However, an order of prohibition prohibiting other judges from hearing the case was refused on the grounds it would be "grossly insulting" to other courts to issue prohibition at this point in time.[32]

The first major Supreme Court of Canada decision to deal with abuse of process was *Osborn*. The accused was charged with possession of cheques that were adapted and intended to be used to commit forgery. The charge was laid on November 23, 1965. The case proceeded to trial in September of 1966, with the trial judge directing the jury to acquit on the grounds that the cheques were complete and that there was no evidence connecting the respondent with the actual forgery of the cheques.

The Crown appealed to the Ontario Court of Appeal, the appeal being dismissed by that court in January of 1967. In May of 1967, Mr. Osborn was again indicted in relation to the same incident, this time with conspiracy to utter forged cheques.

At the beginning of the second trial, defence counsel entered a plea of *autrefois acquit*. Subsequently, the Supreme Court of Canada held that the facts more properly raised the defence of res judicata. Incidental to the discussion of res judicata was the argument that the second proceedings would be oppressive. The trial court held that the special pleas were not available, and the accused plead not guilty. The trial proceeded and the accused was convicted on January 27, 1968.

The accused appealed the conviction on the grounds that:

> The learned trial judge erred in the exercise of his judicial discretion in failing to stop the prosecution which on the facts created abuse of process and injustice.

On November 26, 1968, the Ontario Court of Appeal in a unanimous decision, held that to allow the conviction to stand would be an abuse of process.[33]

The major question in the case was whether or not criminal courts had the power to prevent abuses of their own process. The Ontario Court of Appeal cited, with approval, obiter by J. K. MacKay, J. A., in R. v. Leclair,[34] wherein he stated that a criminal court did have such powers. The court also cited with approval the case of Connelly v. D.P.P.,[35] in which the majority of the House of Lords held that criminal courts had "an inherent jurisdiction ... supplementary to but independent of the jurisdiction exercised with respect to the pleas of autrefois".[36]

The court further accepted the reasons for this jurisdiction as laid out by Lord Devlin in Connelly.

> As a general rule a judge should stay an indictment (that is, order that it remain on the file not to be proceeded with) when he is satisfied that the charges therein are founded on the same facts as the charges in a previous indictment on which the accused has been tried, or form or are a part of a series of offences of the same or a similar character as the offences charged in the previous indictment. He will do this because as a general rule it is oppressive to an accused for the prosecution not to use r.3 where it can properly be used, but a second trial on the same or similar facts is not always and necessarily oppressive, and there may in a particular case be special circumstances which make it just and convenient in that case. The judge must then, in all the circumstances of the particular case, exercise his discretion as to whether or not he applies the general rule. (The reference to r.3 is to a provision of the Indictments Act, 1915 (U.K.), c.90 permitting the joinder of charges in one indictment).[37]

The court in Osborn held that they could find nothing to suggest that the power to prevent an abuse of process was confined to the civil side of the courts. Once this was held, the court reviewed the facts in this case to discover whether there was such an abuse. Jessup, J. A., stated that "... I think that the long delay coupled with the Crown's intervening appeal results in unjust oppressiveness from the second indictment".[38] The court held that the power should be used sparingly in favor of an accused "only where a real injustice" would result.[39]

The case was then appealed to the Supreme Court of Canada and the Court reversed the Ontario Court of Appeal and restored the conviction. Again, the major question in the case was whether there was an inherent jurisdiction in the courts of criminal jurisdiction to prevent abuses of process. The Supreme Court of Canada left the issue in doubt, with three judges holding there was no such power; three other judges holding that there was, but that the issue was not applicable in this situation; and Chief Justice Fauteux agreeing that the appeal should be allowed.

Pigeon J., speaking for the three Justices that held there was no such power in criminal courts to protect their own process stated that:

> The real problem, in my view, is whether there exists in our criminal law a rule that in the case of a multiplicity of charges successively made on the same facts, a trial Judge has discretion to stay an indictment when, on all the facts of the case, laying it is considered as an

> injustice amounting to oppression. In this Court as in the Court of Appeal, counsel have been unable to cite any case in Canada where such a discretionary rule has been recognized or acted upon other than the obiter dictum of Mackay, J. A., in R. v. Leclair, ...[40]

Pigeon, J., stated that Connelly was of no assistance, as the differences in our criminal law prevented a court from acting in this fashion:[41]

> It is basic in our jurisprudence that the duty of the Courts is to apply the law as it exists, not to enforce it or not in their discretion ... I can see no legal basis for holding that criminal remedies are subject to the rule that they are to be refused whenever in its discretion, a Court considers the prosecution oppressive.[42]

The three Justices that held there was an inherent jurisdiction held that the issue did not need to be considered as there was no evidence of oppression. Hall, J., then reviewed the factors and the subsequent adjournments to discover whether there was a "long delay".

> Now, in respect of the delay, the record shows that the appeal from the acquittal on the first indictment was disposed of in January, 1967. The indictment for conspiracy was preferred to the General Sessions of the Peace for the County of York on May 1, 1967, and the respondent appeared for arraignment on May 12th. He was remanded in custody until trial but soon released on bail to appear for trial on September 18, 1967. He did

> not appear on that date and a bench warrant was issued by His Honour Judge MacRae. An explanation was given that he was in hospital on the morning of September 18th, and he was again released on bail to appear for trial on December 1st. He did not appear and a bench warrant was issued and the case remanded to December 18th, and he was ordered to remain in custody. He was granted bail on an appeal to a Judge of the Supreme Court of Ontario and the case remanded peremptorily for trial on January 22, 1968, on which date the trial began.
>
> Then, in regard to the delay between the time of his conviction and his appeal therefrom to the Court of Appeal for Ontario, I pointed out previously that the original notice of appeal was dated February 28, 1968, and amended some eight months later on October 18, 1968, and judgment given on November 25, 1968. It is, therefore, clear that such delays as did occur were principally attributable to the respondent and not to the Crown.[43]

Therefore, the issue of whether criminal courts had the power to control abuses of their own process remained unresolved. Chasse, in an article entitled "Abuse of process as a control of prosecutorial discretion",[44] examined the ramifications of the Osborn decision. He begins by speaking about the pre-Osborn view of abuse of process and the idea that such abuses were controlled by the Crown prosecutor. He was the "thirteenth juryman", the impartial arbitrator between society and the individual accused.

Chasse states that problems arose as the big metropolitan areas began to spread. No longer could one prosecutor be assigned to a case, and the trend spread by assigning prosecutors to courts, not cases. No longer could defence counsel look to a single prosecutor to control the conduct of the trial. Further, as the prosecutors in the Attorney General's office filled with younger lawyers, they would often rely on experienced police officers to get them through trials. Chasse states the court's intervention stems from the lack of control being exercised by the Crown in these instances and examines the considerations that must be taken into account if the court is to exercise the discretion previously exercised by the prosecutor.

> The factors that he would consider would be as follows, although not necessarily in the following order:
>
> 1. The extent of loss - loss of life, property, injury, damage.
> 2. Danger to the public - the accused's background and known propensities - possiblity of a repetition of the offence.
> 3. The strength of the Crown's case.
> 4. Expense to the accused in bringing him back to court.
> 5. Were public rights or interests involved or merely private interests?
> 6. Civil remedies available to the injured parties.
> 7. Punishment or loss already undergone by the accused.

8. Fairness in the handling of the prosecution from the beginning.
9. Accused's inability to withstand a second trial - illness, etc.
10. Length of time that has passed since the alleged occurrence and since the withdrawal or dismissal of the first charge.
11. The reason why the Crown was unable to proceed on the trial date set on the first information.
12. At the time of the withdrawal or "dismissal", did the Crown give any indication that it was abandoning the prosecution?
13. The views of the complainant.[45]

Further, Chasse states that police conduct into the investigation as well as the accused's record must be considered.[46] He then discusses the problems of the court's reviewing the accused's past conduct or deciding the strength of the Crown's case (i.e. the problem of prejudicing the accused). However, if the accused's past conduct is not reviewed, Chasse argues that police methods and delay would not be subject to any counter weight or balancing.

Canada's courts did undertake to control prosecutorial behavior after the Osborn decision, although only a few used Chasse's 13 factor test. Between Osborn and Rourke, 27 cases dealing with delay under the rubric of abuse of process were decided. Of those 27, 15 held that criminal courts had the power to control their own process by either staying the charge, quashing the indictment or information, overturning the conviction or issuing prohibition orders prohibiting lower courts from hearing the matter again.[47] Some six other cases held that the courts did have the power to control abuses, accompanied by delay, but held the facts in the case did not warrant the imposition of this special power.[48] Five other cases were silent on the issue but rejected the accused's arguments on other grounds.[49] Finally, only one case held that criminal courts did not have the power to control their own process in the face of the given fact situation.[50]

The cases that held criminal courts had the power to control their own process and which did stay or quash the indictments, or prohibit further proceedings, looked at numerous factors. They looked at impairment to the defence,[51] including faded memories or missing witnesses.[52] The anxiety of the accused in delayed proceedings was also mentioned,[53] as well as the public embarrassment[54] and the distance from the accused's home.[55] Inadequate facilities have been the grounds of some stays,[56] and delays attributed to an overloaded court system have been held to be inexcusable.[57] Crown conduct which attempts to avoid a dismissal of charges by withdrawing or staying and then relaying the information has been held to be an abuse of process.[58] Finally, proceedings have been stayed where the delay has been attributed to the Crown or police waiting until a serving prisoner is eligible for parole before bringing the charges.[59]

The case which appeared to end the abuse of process argument was Rourke v. The Queen.[60] The case involved the alleged offence of kidnapping and robbery on October 5, 1971. The police had not moved to obtain a warrant for the accused's arrest, but simply put out a "pick-up" request. The police knew the accused, as they had picked him up on a Bench Warrant on October 4, 1971, with respect to a traffic violation. He was scheduled to reappear on October 29, 1971, to answer the traffic charge but failed to appear. Another Bench Warrant was issued with respect to the traffic charge only. The accused was arrested and charged with the robbery and kidnapping offences on April 3, 1973, pursuant to a warrant issued on February 26, 1973, and the preliminary was held in June of 1973.

There was no evidence whatsoever that the accused had been hiding from the police. In an affidavit, which the county court judge found to be accurate, the accused had lived openly in the Creston, B.C. area for the last two years, was employed there and had a motor vehicle registered in his name. Further, the accused knew several R.C.M.P. officers, as he played baseball with them. As well, the parole authorities knew him and where he lived. There was no search for him, let alone a diligent search.

Because of the delay, the accused on November 22, 1973, moved for and was granted a stay of proceedings on the grounds that the delay was an abuse of process. The particulars of the accused's complaints were that as a result of the delay, he did not have a right to a full and fair defence. He stated that during the intervening 20 months, a bottle allegedly containing some finger prints had been destroyed and four persons who would have been material witnesses for the accused had become unavailable, one having died and the others having either disappeared or could not be located. The county court judge stayed the proceedings not only on the grounds of an unconscionable delay, as he found that there was such a delay, but because associated therewith were facts which were prejudicial to the accused, namely the destruction of evidence and the unavailability of witnesses.

The crown then appealed the matter to the B.C. Supreme Court, where a motion for mandamus was rejected.[61] The court held that there was an inherent jurisdiction to stay proceedings, but that the Supreme Court had no jurisdiction to grant mandamus in this situation, as they held that the county court judge exercised his jurisdiction and discretion bona fide, and that they had no jurisdiction to overturn it.

The Crown then appealed to the B.C. Court of Appeal, wherein that court held that while criminal courts have the inherent jurisdiction to prevent an abuse of process, the facts in this situation did not warrant the exercise of that discretion. The case was then appealed to the Supreme Court of Canada. The Court unanimously rejected the accused's appeal. However, the more important decision of whether criminal courts have an inherent jurisdiction to prevent abuses of their own process was not unanimous. In a five-four decision, the Court held that there was no such power in the criminal courts to "stay proceedings regularly instituted because the prosecution is considered oppressive."[62]

The judgment of the minority was written by Laskin, C. J. C. After defining the underpinnings on which a discretion of this type could be exercised,[63] the two questions Laskin, C. J. C., had to decide was whether abuse of process:

> ... is a ground upon which a Court may direct a stay of criminal proceedings and, second, whether if there is such a doctrine it extends to delay in charging an accused where that delay is associated with likely prejudice to his defence."[64]

The Chief Justice referred to Osborn, and cited with approval the Court's split decision that there was such a power. He also attempted to bring the other special pleas into the ambit of "abuse of process".

> In a broad sense, pleas of autrefois convict and acquit, and of res judicata and issue estoppel may be said to be aspects of abuse of process; they may be regarded as crystallized means of control, having a particular ambit of operation but not exhaustive of the scope of abuse of process.[65]

Other such examples were given by the Chief Justice, such as the right of the courts to prevent abuses of their own process in respect of the use of criminal courts to collect private debts.

Laskin, C. J. C., referred with approval to Connelly, and particularly the reasons of Lord Devlin in that case. Laskin adopts the reasoning of Lord Reid, who stated that "there must always be a residual discretion to prevent anything which savours of abuse of process".[66] While the Chief Justice also cited with approval Lord Morris's reasoning, he puts greater emphasis on Lord Devlin's, who was much more emphatic with respect to the power of the criminal courts. He cites with approval Lord Devlin's comments that "The courts cannot contemplate for a moment the transference to the executive of the responsibility for seeing that the process of law is not abused".[67]

Laskin, C. J. C., then referred to D.P.P. v. Humphrys,[68] where a differently constituted House of Lords discussed issue estoppel, which was also considered in Connelly. While it seemed clear that the question of whether the prosecution should proceed in light of oppressiveness was not argued, three members of the House of Lords in Humphrys expressed an opinion on the question, with two being in total agreement of the power residing in all courts, and one stating that it only resided in superior Court Judges.[69]

Laskin, C. J. C., held that while neither Connelly nor Humprys was of direct assistance, he held that the power to prevent abuses of process was a power criminal courts had, although it was a power to be exercised in special circumstances and not randomly. He concluded that while there was such a power, he could not exercise it in this situation, as there was no contention that the delay in apprehending the accused had any ulterior motive, and stated that courts were in no position to tell the police that they did not proceed expeditiously.

Pigeon, J., speaking for the majority, held the following:

> I have to disagree with the view expressed by McIntyre, J. A., that there could be factual situations given to a trial Judge discretion to stay proceedings for a delay. For the reasons I gave in R. v. Osborn ..., I cannot admit of any general discretionary power in Courts of criminal jurisdiction to stay proceedings regularly instituted because the prosecution is considered oppressive.[70]

While it appears on the face of Rourke that the highest court in the land rejected the existence of the "abuse of process" defence, there are two points of interest in the majority decision. The first is Pigeon, J.'s, comment that he could not "admit of any general discretionary powers in Courts of criminal jurisdiction to stay proceedings regularly instituted [emphasis mine] because the prosecution is considered oppressive."[71] When is a proceeding "regularly instituted"? Secondly, when reviewing the whole judgment of Viscount Dilhorne in Humphrys, which Pigeon, J., cites with approval, Viscount Dilhorne elaborates on his statement doubting the power of criminal courts to control abuses of their process.

> If there is a power which my noble and learned friends [he is referring to Lord Salmon and Lord Edmund-Davies] think there is to stop a prosecution on indictment in limine, it is in my view a power that should only be exercised in the most exceptional circumstances.[72]

Therefore, it may be that Pigeon, J., is allowing the possibility that abuse of process may be invoked in exceptional circumstances, rather than any general power to stay proceedings, which he clearly rejects. It is interesting to note that Hollingworth, J., accepted this line of reasoning in the Ontario decision of R. v. Loubier.[73] He states, albeit in dicta, that:

> It, therefore, I believe, is a fair conclusion that there are exceptional circumstances which derogate from Pigeon, J.'s generalization that the trial judge never had jurisdiction to stay proceedings.[74]

In his article entitled "Abuse of Process: The Aftermath of Rourke",[75] Stanley A. Cohen reviews the doctrine of abuse of process. He begins by noting that the power has always been used to prevent the manipulation of any party, rather than to protect an accused.[76] He further notes that "The destruction of the doctrine implies impotency in the courts, a situation which can only foster disrespect for the administration of justice."[77] Indeed, he refers to a case where the court used its power to protect the abuses of one of its own judges.[78]

Cohen concludes by looking at a case where the abuse of process argument was used by way of preliminary plea, but only for the limited objective of obtaining a temporary stay to correct the abuse. In R. v. Lynch and D'Aoust,[79] the court stayed a preferred indictment and reopened the preliminary inquiry. There, it appears the Crown had sufficient evidence to obtain a committal and was invited to present more evidence to the court, but declined. Both accused were discharged, but later a direct indictment was preferred. The court held that this temporary stay was necessary to ensure a fair trial and protect the integrity of the court.[80] Cohen states that:

> Therefore, in Lynch, we are witnessing the first appearance of a concept of a temporary stay purportedly exercised under the name of abuse of process. Such a concept was clearly beyond the considerations guiding the Court in Rourke. The expressed concern of the majority judgment lay in final determinations made as a consequence of preliminary plea. A temporary or interim determination does not fall within that category.[81]

After Rourke, many cases examined did not argue abuse of process resulting from delay, in spite of the fact similar delays resulted in many pre-Rourke dismissals. Yet where it was argued, a surprising number of cases held the abuse of process argument was still very much alive. Of the

16 relevant cases decided after Rourke but before Krannenburg, five held that they had the power to stay charges and did.[82] Three of these cases involved delays coupled with Crown withdrawals or stays to avoid a dismissal of the charges, followed by a relaying of the charges.[83] The other two involved an abuse of process without delay.[84] The courts in another six of the cases implied they had the power to stay charges on the basis of abuse of process, yet held the facts did not warrant it.[85] Two of these cases specifically mentioned the delay was insufficient to warrant it,[86] while two others held there was no ulterior Crown motive shown.[87] Of the remaining five cases, two specifically held the courts still had the power to stay but the facts did not warrant it.[88] Finally, the other three held the courts had no such power.[89]

The last case in the Supreme Court of Canada's abuse of process trilogy was Krannenburg. In dicta, Dickson, J., held that Doyle v. The Queen[90] should not be interpreted as meaning that in every case where jurisdiction has been lost, a new information may be relaid. The Court held that it "may amount to nothing less than an abuse of process".[91]

After Krannenburg and before the Charter's proclamation, the 14 cases on point were as confusing and divergent on the issue as were the pre-Krannenburg cases.[92] Delay coupled with Crown withdrawals and stays, which are then reinstituted, were held to be an abuse of process.[93] The courts in two of the 14 cases stayed the charges,[94] but one did not.[95] Two cases held the courts had the power to stay if an ulterior motive could be proven, but found none and refused to stay the proceedings.[96] Three others held that the delay was not sufficiently excessive or prejudicial to be classified as an abuse of process, implying the court had the power to stay.[97] Another held harrassment or unjust treatment was not present and a stay was not warranted.[98] One case affirmed the power to stay where delay is accompanied with the Crown breaking a "deal".[99] Finally, two cases held the courts had no power to stay charges.[100] All that can be said of this area of the law is that it is in a state of disarray. The trilogy appears to have solved little.

D. Conclusion

It is fair to state that the Canadian pre-Charter jurisprudence has considered delay as a factor in staying or dismissing proceedings. This factor is usually combined with questionable motives on the part of the Crown. Prior to both Osborn and Rourke however, there were numerous decisions where delay was the major or sole factor in staying or dismissing the proceedings.[101] In Canada, delay has been included under the abuse of process doctrine. As such, delay has been extended the same "arsenal" of remedies as abuse of process, including stays, dismissals, orders of prohibition and certiorari. In Canadian jurisprudence, delay's existence has been based on the abuse of process doctrine, not so much for its articulation, but rather for its remedies. For even if the courts were to suggest that the delay was so extreme that it would be oppressive to continue, the Crown could always enter a stay and recommence the proceedings later. It was the abuse of process doctrine that provided the "muscle" to enforce the court's ruling.

In Rourke, the very existence of the abuse of process doctrine was called into question. Specifically, pre-indictment delay was held not to be grounds to stay "regularly instituted proceedings".[102] Further, the attack on the abuse of process doctrine left the question of whether post-indictment delay was grounds for staying proceedings. Yet after Rourke, the lower courts continued to invoke the doctrine of abuse of process.[103] While doing so, they continued to consider delay as a factor in determining whether an abuse of process was about to occur.[104] Other lower court decisions either implied or assumed criminal courts had the power to stay proceedings on the basis of the abuse of process doctrine,[105] but held the facts of the case did not warrant its exercise. Two cases specifically referred to the fact that the delay was not so excessive as to warrant invoking the doctrine.[106] In spite of Rourke, lower courts continued to consider delay.

The case which repudiated the belief that the abuse of process doctrine was extinct was Krannenburg. There, Dickson, J., specifically refers to proceedings which may amount to an abuse of process.[107] After Krannenburg, the lower courts continued to consider delay as a factor in the abuse of process determination.[108]

The decisions just referred to display an uneasiness on behalf of the lower courts to "disarm" themselves of the fundamental power to patrol their own proceedings. Delay has been a factor in their considerations. With the arrival of s.11(b), the courts will no longer have to rely on the power and the remedies available under the abuse of process doctrine. Parliament has singled out delay as an evil to be guarded against and has given it a remedy of its own.

An important aspect of the abuse of process cases that considered delay was the actual time frame involved.

The reasonableness of a delay is not a concept that is foreign to our courts. There exists a body of common law that has considered the reasonableness of delay. It will offer guidance to our courts in determining the reasonableness of delay under s.11(b).

FOOTNOTES

1 Rourke v. The Queen (1978) 35 C.C.C. (2d) 129 (S.C.C.)

2 R. v. Big M. Drug Mart (1984) 9 C.C.C. 310 at 338 (Alta. C.A.)

3 Ibid, 338

4 Reference Re Anti-Inflation Act (1976) 68 D.L.R. (3d) 452 (S.C.C.)

5 Ibid, 466

6 Lower Mainland Dairy Products Board et al. v. Turner's Dairy Ltd. et al. [1941] S.C.R. 573

7 Ibid, 583

8 Reference Re Anti-Inflation Act (1976) 68 D.L.R. (3d) 452 at 470 (S.C.C.)

9 Id.

10 Id.

11 Klopfer v. North Carolina, 386 U.S. 213, 223 (1966)

12 Id.

13 Klopfer v. North Carolina, 386 U.S. 213, 223-224 (1966)

14 Tarnopolsky, The Canadian Charter of Rights and Freedoms (1982) 367

15 Manning, Rights, Freedoms and the Courts: A Practical Analysis of the Constitution Act, 1982 (1983) 368

16 Klopfer v. North Carolina, 386 U.S. 213, 225 (1966)

17 R. R. Cherry, The Growth of Criminal Law in Ancient Communities (1890), 104

18 United States v. Marion et al., 404 U.S. 307 (1971)

19 Rex v. Robinson 1 Black. W. 541, 96 Eng. Rep. 313 (K.B. 1765), Regina v. Hext 4 Jurist 339 (Q.B. 1840), Rex v. Marshall 13 East 322, 104 Eng. Rep.

394 (K.B. 1811), Regina v. Robins 1 Cox's C.C. 114 (Somerset Winter Assizes 1844) Also see Ex Parte Hopper (1854) 23 L.T. 164

20 R. v. Lorenzo (1909) 16 C.C.C. 19, 14 O.W.R. 1038, 1 O.W.N. 179, (Ont. H.C.)

21 R. v. Luigi (1909) 14 O.W.R. 1041 (Britton, J., in Chambers)

22 R. v. Lee Sow [1922] 2 W.W.R. 208 (B.C.S.C. Chambers)

23 R. v. Hallchuk (Elchuk) [1928] 1 D.L.R. 731, 51 C.C.C. 18, [1928] 1 W.W.R. 646 (Man. K.B.)

24 R. v. Osborn [1971] S.C.R. 184, 15 D.L.R. (3d) 85, 12 C.R.N.S. 1, 1 C.C.C. (2d) 482; revg (1969) 1 D.L.R. (3d) 664 (Ont. C.A.) 15 C.R.N.S. 183, [1969] 4 C.C.C. 185, 1 O.R. 152

25 In Rourke v. The Queen 35 C.C.C. (2d) (1977) 129 (S.C.C.), the case involved an appeal by the accused from the judgment of the British Columbia Court of Appeal, (1975) 62 D.L.R. (3d) 650, 25 C.C.C. (2d) 555, [1975] 6 W.W.R. 591, allowing an appeal by the Crown from the decision of Rae, J., (1974) 16 C.C.C. (2d) 133, dismissing a Crown application for a writ of mandamus directing the county court judge to proceed with the trial of the accused on charges of robbery and kidnapping.

26 R. In Right of Alberta v. Krannenburg (Krannenberg) (R.v.) [1980] 2 W.W.R. 651 (S.C.C.)

27 A brief synopsis of the lower court decisions will be touched on, with an appendix to the thesis (marked Appendix A) describing these cases in more detail. The case names and citations may be found in Appendix A and the Bibliography, respectively.

28 R. v. Gotfried [1964] 2 C.C.C. 382 (Man. C.A.)

29 R. v. Advance T.V. and Car Radio Centre, R. v. Friedman (1968) 1 D.L.R. (3d) 231 (Man. C.A.)

30 R. v. Botting [1966] 2 O.R. 121 (Ont. C.A.)

31 R. v. McClevis; Ex p. Wright and Wright (1970) (sub nom. Re Wright and Wright) 1 C.C.C. (2d) 173 (Ont. H.C.)

32 *Ibid*, 179

33 *R.* v. *Osborn* [1969] 4 C.C.C. 185

34 *R.* v. *Leclair* (1956) 115 C.C.C. 297 (Ont. C.A.)

35 *Connelly* v. *D.P.P.* [1964] 2 ALL E.R. 401

36 *R.* v. *Osborn* [1969] 4 C.C.C. 185 at 188

37 *Id.*

38 *Ibid*, 191

39 In this situation, they held they would exercise it. See also *R.* v. *Shipley* [1970] 3 C.C.C. 398 (Ont. Co. Ct.), [1970] 2 O.R. 411, (McAndrew, Co. Ct. J.) where the court upheld the principle of abuse of process in the entrapment situation of a drug trafficker. The court relied heavily upon *R.* v. *Osborn* [1969] 1 O.R. 152, [1969] 4 C.C.C. 185, 1 D.L.R. (3d) 664, in respect to having the jurisdiction to stay the proceedings. (*Osborn* was between the Ontario Court of Appeal and the Supreme Court of Canada, which subsequently overturned the Ontario Court of Appeal.)

40 *R.* v. *Osborn* (1971) 1 C.C.C. (2d) 482 at 489

41 *Id.*

42 *Ibid*, 491

43 *Ibid*, 486-487

44 K. L. Chasse, "Abuse of process as a control of prosecutorial discretion" (1970) 10 C.R.N.S. 392

45 *Ibid*, 402

46 *Ibid*, 404

47 See Appendix A, pages 184-192

48 *Id.*

49 *Id.*

50 *Re Regina and Attwood* (1972) 8 C.C.C. (2d) 147 (N.W.T. Terr. Ct.)

51 R. v. Trendsetter Developments Limited (1972) 5 C.P.R. 231 (Ont. Prov. Ct.)

52 A.G. for Saskatchewan v. McDougall [1972] 2 W.W.R. 66 (Sask. Dist. Ct.), R. v. Thorpe (1973) 11 C.C.C. (2d) 502 (Ont. Co. Ct.)

53 A.G. for Saskatchewan v. McDougall [1972] 2 W.W.R. 66 (Sask. Dist. Ct.)

54 R. v. Koski (K) (1972) 5 C.C.C. (2d) 46 (B.C.S.C.)

55 R. v. Ittoshat (1970) 12 D.L.R. (3d) 266 (Que. Sess. Ct.)

56 R. v. Falls and Nobes (1976) 26 C.C.C. (2d) 540 (Ont. G.S.P.), R. v. Buckley et al. (1976) 38 C.R.N.S. 12 (Ont. Co. Ct.)

57 Ibid

58 R. v. McAnish and Cook (1973) 15 C.C.C. (2d) 494 (B.C. Prov. Ct.), R. v. Heric (1976) 23 C.C.C. (2d) 410 (B.C. Prov. Ct.)

59 R. v. Del Puppo (1974) 16 C.C.C. (2d) 462 (B.C. Prov. Ct.)

60 Rourke, Supra, fn 25

61 Rourke v. The Queen (1974) (sub nom. The Queen v. Rourke) 16 C.C.C. (2d) 133 (B.C.S.C.)

62 Rourke v. The Queen (1977) 35 C.C.C. (2d) 129 at 145

63 The relevant question, in my opinion, is whether the County Court Judge committed an error of law in purporting to exercise a discretion on grounds that did not call for it or, to put the matter another way, on a basis which did not raise the issue on which discretion was exercised. If that be so, mandamus would lie to compel him to proceed with the trial of the charges preferred against the accused. Rourke v. The Queen (1977) 35 C.C.C. (2d) 129 at 134

64 Id.

65 Ibid, 136

66 Ibid, 139

67 Ibid, 140

68 D.P.P. v. Humphrys [1976] 2 ALL E.R. 497

69 All three, Viscount Dilhorne and Lords Salmon and Edmund-Davies, supported the power of a superior Court to prevent unfairness to an accused, but Viscount Dilhorne was of the view that this power did not extend to preventing an indictment properly preferred from being proceeded with, and he also doubted whether the power to prevent abuse of process extended to Magistrates' Courts, being troubled by a possible lack of uniformity among different Benches, a result that I should have thought was equally possible among superior Court Judges and curable as to both by the Court of Appeal and the House of Lords. Lord Salmon and Lord Edmund-Davies took a contrary view on the question whether a Judge has power to intervene to decline to allow a prosecution to proceed if it amounts to an abuse of process, holding that there was such a power which Lord Salmon characterized, as did Lord Devlin in Connelly, as one of great constitutional importance that should be jealously preserved. Rourke v. The Queen (1977) 35 C.C.C. (2d) 129 at 142

70 Rourke v. The Queen (1977) 35 C.C.C. (2d) 129 at 145. Pigeon, J., cited with approval Viscount Dilhorne in D.P.P. v. Humphrys which expressed doubt as to whether the power to prevent an abuse of the process of the court existed in magistrates courts. Pigeon, J., also held that as there was an absence of any provision in the Criminal Code suggesting a power to stay an indictment by a trial judge, it was a strong indication against the existence of any such power.

71 Id.

72 Humphrys, Supra, fn 43, 510

73 R. v. Loubier (1978) 4 C.R. (3d) 96 (Ont. H.C.)

74 Ibid, 101

75 S. A. Cohen, "Abuse of Process: The Aftermath of Rourke" (1977) 39 C.R.N.S. 349

76 Cohen states that:

> "In essence, the question which came before the Supreme Court in Rourke was whether or not the ongoing evolution and development of the criminal law could validly be said to have been occurring under the aegis of a so-called 'doctrine of abuse of process'. Could the incremental development of this doctrine withstand and survive the close scrutiny of our court of last resort? (It should be remembered that the Supreme Court of Canada appeared to affirm the existence of the doctrine in criminal matters in a decision rendered over 90 years ago: see Re Spoule (1886), 12 S.C.R. 140. Also, it should be remembered that the most recent period of activity concerning the use of the doctrine appears to flow quite naturally from a line of cases extending over 50 years (between 1920 and 1970). In these cases, cited above, the criminal courts declined to allow their process to be abused by disgruntled ceditors [sic] who sought to use the criminal courts as an aid to debt collection." Ibid, 352

> "What must ever be borne in mind in this regard is that the doctrine of abuse of process exists in order to ensure and safeguard the integrity of the legal process. Unlike many other matters, it does not exist 'in order to safeguard the rights of the accused'. It exists in order to repulse the manipulations of any party who would seek to distort orderly lawful processes and employ them for purposes not contemplated or intended. With some justification it may properly be described as a 'Judicial Bill of Rights.'" Ibid, 352

77 Id.

78 "In Sproule, supra, the Supreme Court of Canada utilized the doctrine in order to quash a writ of habeas corpus which had

been 'improvidently granted' by Henry J. (a brother judge of the same court) in chambers. In essence, the court in that case utilized the doctrine in order to curtail the ostensible misconduct of one of its judges". Ibid, 353

79 R. v. Lynch and D'Aoust (1977) 38 C.R.N.S. 118 (Ont. H.C.)

80 Ibid, 127-128

81 Cohen, Supra, fn 75, 364-365

82 See Appendix A, pages 192-196

83 R. v. Weightman and Cunningham (1977) 37 C.C.C. (2d) 303 (Ont. Prov. Ct.), R. v. Hickey (1978) 44 C.C.C. (2d) 367 (Ont. Prov. Ct.), Tasek v. R. in Right of B.C. et al. (1978) 8 B.C.L.R. 304 (B.C.S.C.)

84 R. v. Pulla (1978) 3 C.R. (3d) 201 (Ont. S.C.), Re Abitibi Paper Co. and The Queen (1979) (sub nom. Abitibi Paper Co. v. R.) 99 D.L.R. (3d) 333 (Ont. C.A.)

85 R. v. Glass (No. 1) (1978) 4 C.R. (3d) 197 (Nfld. Prov. Ct.), Blomme v. R. (1979) 7 Alta. L.R. (2d) 116 (Alta. S.C.A.D.), Re Orysiuk and The Queen (1978) (sub nom. R. v. Orysiuk) 37 C.C.C. (2d) 445 (Alta. S.C.A.D.), Re Asselin and R. (1979) 55 C.C.C. (2d) 332 (Que. C.A.), R. v. Lizee (1978) 4 C.R. (3d) 115 (B.C.S.C.), R. v. Schell (1980) 11 Alta. L.R. (2d) 62 (Alta. C.A.)

86 R. v. Glass (No. 1) (1978) 4 C.R. (3d) 197 (Nfld. Prov. Ct.), Blomme v. R. (1979) 7 Alta. L.R. (2d) 116 (Alta. S.C.A.D.)

87 Re Orysiuk and The Queen (1978) (sub nom. R. v. Orysiuk) 37 C.C.C. (2d) 445 (Alta. S.C.A.D.), Re Asselin and R. (1979) 55 C.C.C. (2d) 332 (Que. C.A.)

88 R. v. Babcock (1978) 4 C.R. (3d) 105 (B.C. Prov. Ct.), Re Ball and The Queen (1978) 44 C.C.C. (2d) 532 (Ont. C.A.)

89 R. v. Loubier (1978) 4 C.R. (3d) 96 (Ont. H.C.), Uyeyama v. Craig J. and A.G. of B.C. [1979] 6 W.W.R. 319 (B.C.S.C.), R. v. Lebrun (1979) 45 C.C.C. (2d) 300 (B.C.C.A.)

90 Doyle v. The Queen (1976) 68 D.L.R. (3d) 270 (S.C.C.), 35 C.R.N.S. 1, 29 C.C.C. (2d) 177

91 R. In Right of Alberta v. Krannenburg (Krannenberg) (R.v.) [1980] 2 W.W.R. 651 at 658.

The case itself involved an accused charged with a driving offence who was summoned to appear in one court room but whose information appeared in another courtroom at a different time. Defence argued that jurisdiction was lost, whereas the Crown argued s. 440.1 [en. 1974-75-76, c. 93 s. 43], of the Criminal Code R.S.C. 1970, c. C-34 assisted the Crown in procedural mistakes such as this. A Justice in Chambers granted an order of prohibition, prohibiting the provincial court from dealing with the information. The Crown appealed to both the Alberta Court of Appeal and Supreme Court of Canada, the Crown appeal being dismissed in both courts.

An interesting element of the case was Dickson J.'s comments respecting the possible relaying of the charges. The comment clearly shows abuse of process is not a dead issue, as the judgment was concurred in by the entire bench.

> "I add this caveat. The Appellate Division was of opinion that the court had lost jurisdiction over the offence, but that a new information was available, if one could be laid within the limitation period for summary conviction cases. The question of whether a new information may be laid after jurisdiction has been lost is not before us, and I refrain from any extended discussion on the point, in the absence of argument and on the narrow facts of this case. It is manifest, however, that there will be occasions on which the laying of a new information will not be available. Time limitations may preclude it. Indeed, the laying of another information may amount to nothing less than an abuse of process. The successful challenge to jurisdiction may not come until after trial on the merits and conviction. The full effect of s. 440.1 (2) and possible prejudice to the accused, through the laying of a new information, would require consideration. The dicta in Doyle should not therefore, in my opinion, be taken as authority for the proposition that in every case it will

be possible, when jurisdiction over the offence is lost, to lay another information in the same jurisdiction charging the same offence." R. in Right of Alberta v. Krannenburg (Krannenberg) [1980] 2 W.W.R. 651 at 658

92 See Appendix A, pages 196-199

93 R. v. Foong (1980) 17 C.R. (3d) 301 (Ont. Prov. Ct.), R. v. Billen (1980) 54 C.C.C. (2d) 425 (Ont. Prov. Ct.)

94 Id.

95 Re Young et al. and The Queen (1981) 60 C.C.C. (2d) 252 (Sask. Q.B.)

96 R. v. Sim (1982) 63 C.C.C. (2d) 376 (Ont. Dist. Ct.), R. v. Loustel (1981) 11 Sask. R. 145 (Sask. Prov. Ct.)

97 R. v. Curlew (1981) 31 Nfld. and P.E.I.R. 170, 87 APR 170 (Nfld. S.C.T.D.), R. v. Chabun (1982) 39 A.R. 485 (N.W.T.S.C.), R. v. Sibley and Sibley (1982) 55 N.S.R. (2d) 181 and 114 APR. 181 (N.S. Co. Ct.)

98 Re Young et al. and The Queen (1981) 60 C.C.C. (2d) 252 (Sask. Q.B.)

99 R. v. Crneck, Bradley and Shelley (1980) 116 D.L.R. (3d) 675 (Ont. H.C.)

100 R. v. Maxner (1981) 61 C.C.C. (2d) 446 (N.S.C.A.), Re Regina and Allison (1981) 65 C.C.C. (2d) 346 (B.C.S.C.)

101 See fns 28, 31, 51, 52, 54 and 56

102 Rourke, Supra, fn 84

103 See fns 83 and 84

104 See fn 83

105 See fn 85

106 See fn 86

107 See fn 91

108 See fns 93 and 99

CHAPTER II

THE EUROPEAN CONVENTION AND UNITED STATES JURISPRUDENCE

A. The European Convention for the Protection of Human Rights and Fundamental Freedoms

(i) Introduction

The European Convention For The Protection Of Human Rights And Fundamental Freedoms (hereinafter called the "Convention") entered into force in September of 1953. The Convention is unique in that it allows member states to challenge other state's conduct, as well as allowing individuals, in certain circumstances, to do the same.

The Convention establishes three bodies to carry out its mandate. The first body is the Commission. This body is the first to receive petitions from states or individuals. The Commission then analyzes them, attempting to discover the relevant facts and determine whether provisions of the Convention have been breached. Its opinion is written, and it acts as a screening mechanism. The Commission is limited to stating an opinion only. The Commission also serves to establish and facilitate "friendly settlements". If there is no friendly settlement reached, a report is prepared and sent to the Committee of Ministers. The Commission, Court and the Committee of Ministers have the power to make a decision on the question of a violation.

The Court hears cases which have been screened by the Commission. No case has yet been heard by the Court that has not gone through the Commission and been the subject of a report. Hearings are usually in public, unlike the normal Commission's "in camera" sessions.

The Committee of Ministers will review an individual's or state's case after three months of the sending of a report to them. The three-month period is the time limit in which the case may be brought before the Court. If the case is not heard by the Court, it will be heard by the Committee.[1]

(ii) Similarities to the Charter

The Convention offers relevant guidance in interpreting the Canadian Charter of Rights and Freedoms. The most persuasive argument for this proposition is the adoption of the term "reasonable time" in section 11(b) of the Canadian Charter of Rights and Freedoms. S.11(b) reads as follows:

> 11. Any person charged with an offence has the right
> (b) to be tried within a reasonable time;

This term is used twice in the European Convention, in both Articles 5(3) and 6(1).

> Article 5
>
> 1. Everyone has the right to liberty and security of the person.
>
> No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
>
> 3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
>
> Article 6
>
> 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. [excerpt]

Another salient feature of the Convention which offers guidance is that its two official languages are English and French. The problems interpreting words, such as "trial", have been dealt with under the Convention. What a trial is and when it begins and ends may appear, at first glance, to be trivial. However, the distinction takes on new significance when a "trial" begins and ends for a prisoner being held on remand during a prolonged trial. Later, we will examine the situation in which both the English and French versions of the Convention are juxtaposed, and the solution thereof.

Thirdly, support for the Convention's precedential value stems from the Special Joint Committee of the Constitution of Canada Proceedings. References are made to the Convention throughout the proceedings. Dr. Noel A. Kinsella, Chairman of the New Brunswick Human Rights Commission, noted that:

> ... an impressive argument is the fact that the United Kingdom whose system of parliamentary democracy ours is modelled on, have themselves not had great difficulty and indeed they have embraced and ratified the European Convention on the Protection of Fundamental Rights and Freedoms and have recognized the competence of the European Court. That Convention indeed, too, contains not only many of the legal rights but also the so-called egalitarian rights.[2]

It is also clear from the proceedings that the Minister of Justice used, as one of his guidelines, the International Covenant On Civil And Political Rights.[3] Article 9 of the Covenant also enshrines the right to trial "within a reasonable time". The explanatory notes accompanying the October 5, 1980 version of the Charter state that s.11(b) was drawn from the provisions of the Covenant and Convention, demonstrating the reliance placed on these two documents for choosing section 11(b)'s terminology.

Finally, the Convention is a relatively recent document. It was created and entered into after the Second World War, and offers an interesting view on human rights. It can be argued that its relevance is greater than some constitutions which had their origins 200 years ago and which had property rights as the central focus of the document.

The similarities to our Charter offers specific assistance in interpretation. The duty to bring an accused to trial is heavier if the accused is remanded in detention.[4] While this may appear obvious, a fallacy which has been rejected under the Convention is that a state may either release an accused or try him within a reasonable time.[5] The Convention jurisprudence makes it clear that the state does not have such a choice.[6] They must provide a trial within a reasonable time, and must release the accused where they believe he will not commit further offences and where bail conditions will ensure his return.[7] Bail conditions related to the amount of money allegedly stolen is improper.[8]

Secondly, as Wemhoff demonstrates, where a word is capable of two meanings in one language but only one in the other, the interpretation which:

1. is the least ambiguous;
2. reconciles the two meanings as far as possible; and
3. is the most appropriate in aiming to achieve the object of the right[9]

should be accepted.

Under the Convention, "trial" has been interpreted to mean "judgment".[10] Under 6(1), the "judgment" has been held to be final judgment, even if such final judgment is rendered on appeal.[11] Further, the Court has developed a test to determine whether the reasonable time period has been exceeded. Rejecting an elaborate seven-prong test developed by the Commission,[12] the Court demands that the state must present all the evidence for and against the departure from the rule with respect to an individual's denial of liberty under Article 5(3).[13] The Court then looks at the grounds for detention, length of detention, and difficulty in preparing for trial when examining whether time spent on remand awaiting trial is reasonable or not under Article 5(3).[14]

The Court uses a somewhat different test under Article 6(1), examining the complexity of the case as a whole, the applicant's own conduct, and the manner in which the authorities have handled the case, including the national courts.[15] The more complex the case, the more lenient the Court will be on the state in determining "reasonable" time.

The Commission and Court review all delays, and determine whether the state, including all agencies of it, acted diligently.[16] Lack of court facilities or lack of expertise in handling complex cases is no excuse for delay.[17] Finally, the Court looks at the accused's conduct. Most importantly, the Court does not require that the accused demand a trial within a reasonable time; the duty to provide one is on the state. The accused will be penalized for the delays caused by himself. As well, while an accused will not be penalized for exercising his rights to time consuming judicial or other procedures, these procedures are viewed as "objective facts" which are considered in determining a reasonable time.[18]

The Court and Commission have also reviewed when a person is charged and have held that it is when the situation of the person concerned has been substantially affected as a result of the suspicion against him.[19] The same principle is used to determine when the period is over, that being when the accused is no longer affected by the suspicion.[20] The test to determine when one is charged has been elaborated, and has been held to mean the same as the date of "official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence".[21] It has been held that being "charged" may, in some instances, "take the form of other measures which carry the implication of such an allegation and which likewise affect the situation of the suspect".[22]

As for retroactivity or delay before the Convention came into force, the Commission has held that while it does not have jurisdiction in respect of events before the Convention is declared operational in the state, it must, when examining detention prior to that date, examine what stage the proceedings are at.[23] Therefore, it does in fact have regard to previous detention.

The one area that offers little assistance to Canadian courts is the actual time frames. As we have different investigatory and judicial procedures, the actual time period offers little assistance. Incarceration of an accused for seven years while awaiting trial has been held not to have violated the Convention.[24] The Canadian pre-Charter jurisprudence is of more assistance in this respect in that it defines the Canadian context. The reasons for accepting or rejecting the European interpretations under Articles 5(3) and 6(1) will be addressed below.

B. American Jurisprudence Under the Sixth Amendment: Right to a Speedy Trial

Right to speedy trial, witnesses, etc.

> "In all criminal proceedings, the accused shall enjoy the right to a speedy and public trial ...".

The U.S. Supreme Court has been, and undoubtably still is, sharply divided over the issue of the right to a speedy trial. The Court has reached a consensus, however, on a number of issues. The Court has held that the right to a speedy trial is relative,[25] and does not preclude society's rights.[26] It applies to the time of trial, and not its place.[27] It is consistent with delays,[28] and does not mean mere speed, but rather orderly expedition.[29] It secures rights to the accused,[30] and the evils it attempts to prevent are many. Its objects are to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public trial and to prevent the impairment of the defence.[31] It protects against undue delay which may affect the accused's employment, his curtailment of public speech and his association and participation in unpopular causes.[32] It protects against financial hardships inherent in long proceedings.[33] It even applies to prisoners serving time on unrelated matters.[34] It is one of the most basic rights enshrined in the United States Constitution,[35] and imposes a duty on the State to proceed expeditiously.[36]

Society's interests parallel with this right's objectives. Undue delay in bringing a criminal to justice impairs the memory of the state's witnesses.[37] It leaves criminals in society to strike again,[38] and lessens the deterrent value of the penalty.[39] It also serves to penalize public officials who abuse the system by seeking delay to gain a conviction.[40] The right protects society against these evils as well.

Where disagreement develops in interpreting the right is at the point where the "factors" are weighed to determine whether the right has been breached. Of the cases decided to date, the United States Supreme Court has refused to weigh a delay sponsored by the accused in the accused's favour. All cases examine the actual length of delay to determine if it is excessive. Divisions in the Court appear, however, when the reasons for delay are examined. There is criticism over including prosecutorial negligence as a "neutral" reason rather than weighing against the state.[41] Major disagreements arise when one considers whether prejudice is a factor to be considered. While the majority of the Supreme Court has held it is an element to be reviewed,[42] the well-reasoned minority and academic opinions point out that it is nearly impossible to prove what has been lost or forgotten.[43]

Another major disagreement is over the emphasis on a demand by the accused for a speedy trial. While the majority of the Supreme Court has held it affects the accused's complaints of a violation,[44] a strong Supreme Court minority,[45] lawyers,[46] and academics[47] argue that societal and state interests ought not to be foreclosed on the basis of a perceived advantage by the accused.

The majority of the Court has held that delay preceeding indictment, arrest, or otherwise official accusation is not within the purview of the speedy trial right.[48] But again, strong minority dissents,[49] lower court decisions[50] and academic opinion[51] weigh against this position. Successive indictments by separate authorities have been held not to be covered by the speedy trial right,[52] but again, a scathing minority position criticizes this stance.[53]

We shall now examine s.11(b) of the Charter and attempt to develop definitions and tests based on the best reasoning available from the three sources reviewed.[54]

FOOTNOTES

1 For further details of the Convention's structure and procedures, see F. Castberg, The European Convention on Human Rights (1974); J.E.S. Fawcett, The Application of the European Convention on Human Rights (1969); A.H. Robertson, Human Rights in Europe, (2 ed.) A brief synopsis of the European Commission and court decisions are contained in Appendix B, with the case names and citations found in Appendix B and the Bibliography, respectively.

2 Special Joint Committee On The Constitution Of Canada Proceedings 1980-81, 11:34-11:35, found in 32nd PARL. SESS. 1. NOS. 1-16

3 Ibid, 4:58

4 Ernst Stogmuller v. Austria [1964] Y.B. EUR. CONV. ON HUMAN RIGHTS 168 (Eur. Commission of Human Rights) (Admissability); [1969] Y.B. EUR. CONV. ON HUMAN RIGHTS 364, (Eur. Court of Human Rights) at 394

5 Kurt-Heinz Wemhoff v. The Federal Republic of Germany [1964] Y.B. EUR. CONV. ON HUMAN RIGHTS 280 (Eur. Commission of Human Rights) (Admissability); [1968] Y.B. EUR. CONV. ON HUMAN RIGHTS 796 (Eur. Court of Human Rights); (1979-80) 1 E.H.R.R. 55

6 Wemhoff, Y.B. [1968] 796 at 800

7 Fritz Neumeister v. Austria [1964] Y.B. EUR. CONV. ON HUMAN RIGHTS 224 (Eur. Commission of Human Rights) (Admissability); [1968] Y.B. EUR. CONV. ON HUMAN RIGHTS 812 (Eur. Court of Human Rights); (1979-80) 1 E.H.R.R. 91

8 Id.

9 Wemhoff, Y.B. [1968] 796 at 800

10 Id.

11 Neumeister, Y.B. [1968] 812 at 824

12 The term "reasonable time" in Article 5, paragraph (3), must be determined in the light of the concrete facts of each case (see the Commission's previous jurisprudence as summarised in Appendix VI

to this Report). In the opinion of the Commission, the following elements are relevant to the evaluation of the circumstances in a particular case:

1. The actual length of detention

2. The length of detention on remand in relation to the nature of the offence, the penalty prescribed and to be expected in the case of conviction and any legal provisions making allowance for such period of detention in the execution of the penalty which may be imposed. In regard to this criterion, the following considerations enter into account: As the length of detention is to be examined in the light of the circumstances of each case, it follows necessarily that its appreciation may differ according to the nature of the offence concerned and the penalty prescribed and to be expected. However, in the determination of the relation between the penalty and the length of detention on remand, it is necessary to take into account the presumption of innocence as guaranteed by Article 6, paragraph (2), of the Convention. If the length of detention should approach too much the length of the sentence to be expected in the case of conviction, the principle of presumption of innocence would not be fully observed.

3. Material, moral or other effects on the detained person.

4. The conduct of the accused:

   (a) Did he contribute to the delay or expedition of the investigation or trial?

   (b) Was the procedure delayed as a result of the introduction of applications for release pending trial, appeals or other remedies taken by him?

(c) Did he request release on bail or offer other guarantees to appear for trial?

5. Difficulties in the investigation of the case (its complexity in respect of facts or number of witnesses or co-accused, need to obtain evidence abroad, etc.).

6. The manner in which the investigation was conducted:

   (a) the system of investigation applicable;

   (b) the conduct by the authorities of the investigation (the diligence shown by them in dealing with the case and the manner in which they organised [sic] the investigation).

7. The conduct of the judicial authorities concerned:

   (a) in dealing with applications for release pending trial;

   (b) in completing the trial.

After the above elements have been established in a particular case, the conclusion will depend upon an evaluation of these elements in toto. Some of them may point to the conclusion that the length of detention was within reasonable limits, whereas other elements may indicate the contrary. The conclusion depends on their relative importance. This does not exclude the possibility that, in some cases, one single element is of decisive importance, even though other elements may indicate a different conclusion.

Opinion of the Commission, Neumeister Case, [1966-1969] Eur. Court H.R. Pleadings, 67-68, ser. B

13 Stogmuller, Y.B. [1969] 364 at 394

14 Neumeister, Y.B. [1968] 812

15 Herbert Huber v. Austria [1971] Y.B. EUR. CONV. ON HUMAN RIGHTS 572 (Eur. Commission of Human Rights) (Admissability); [1975] Y.B. EUR. CONV. ON HUMAN RIGHTS 324 (Eur. Committee of Ministers of Human Rights); [1974] Y.B. EUR. CONV. ON HUMAN RIGHTS 314 (Eur. Commission of Human Rights) (Admissability)

16 Erich Hatti v. The Federal Republic of Germany [1976] Y.B. EUR. CONV. ON HUMAN RIGHTS 1024 (Eur. Committee of Ministers of Human Rights)

17 Eckel v. The Federal Republic of Germany (1983) 5 E.H.R.R. 1 at 31

18

> However, as the Commission rightly pointed out, Article 6 did not require the applicants actively to co-operate with the judicial authorities. Neither can any reproach be levelled against them for having made full use of the remedies available under the domestic law. Nonetheless, their conduct referred to above constitutes an objective fact, not capable of being attributed to the respondent State, which is to be taken into account when determining whether or not the proceedings lasted longer than the reasonable time referred to in Article 6(1). Ibid

19 Huber, Y.B. [1975] 324 at 356

20 Ibid, 360

21 Eckel v. The Federal Republic of Germany (1983) 5 E.H.R.R. 1 at 27

22 Corigliano v. Italy (1983) 5 E.H.R.R. 334, para. 34

23 Gioranni Ventura v. Italy [1979] Y.B. EUR. CONV. ON HUMAN RIGHTS 148 (Eur. Commission of Human Rights) (Admissability); [1981] Y.B. EUR. CONV. ON HUMAN RIGHTS 472 (Eur. Committee of Ministers of Human Rights), at 152-154

24 Heinz Jentzsch v. The Federal Republic of Germany [1967] Y.B. EUR. CONV. ON HUMAN RIGHTS 218 (Eur. Commission of Human Rights) (Admissability); [1971] Y.B. EUR. CONV. ON HUMAN RIGHTS 876 (Eur. Committee of Ministers of Human Rights)

25 *Beavers* v. *Haubert*, 198 U.S. 77, 87 (1905)

26 *Id.*

27 *Ibid*, 86

28 *Ibid*, 87

29 *Smith* v. *United States*, 360 U.S. 1, 10 (1959)

30 *Beavers* v. *Haubert*, 198 U.S. 77, 87 (1905)

31 *United States* v. *Ewell*, 383 U.S. 116, 120 (1966)

32 *Klopfer* v. *North Carolina*, 386 U.S. 213, 222 (1967)

33 *United States* v. *MacDonald*, 102 S. Ct. 1497, 1507 (1982) (minority decision)

34 *Smith* v. *Hooey, Judge*, 393 U.S. 374 (1968)

35 *Klopfer* v. *North Carolina*, 386 U.S. 213, 226 (1967)

36 *Dickey* v. *Florida*, 398 U.S. 30, 50 (1969)

37 *Ibid*, 42

38 *Id.*

39 *Id.*

40 *Ibid*, 43

41 R. H. Uviller, "*Barker* v. *Wingo*: Speedy Trial Gets a Fast Shuffle" (1972) 72 *Columbia Law Review*, (1972) 1376

42 *Barker* v. *Wingo, Warden*, 407 U.S. 514 (1971)

43 Brennan, J., in *Dickey*, *Supra*, fn 36 and Uviller, *Supra*, fn 41

44 *Barker* v. *Wingo, Warden*, 407 U.S. 514 (1971)

45 See minority position in *Dickey*, *Supra*, fn 36

46 American Bar Association Project on Standards for Criminal Justice, Speedy Trial 14-17 (Approved Draft 1968)

47 Uviller, *Supra*, fn 41

48 Hoffa v. United States, 385 U.S. 293 (1966), United States v. Marion et al., 404 U.S. 307 (1971)

49 Marion, Ibid, Dickey, Supra, fn 36

50 United States v. Lustman, 258 F. 2d 475, 477-478 (C.A. 2d Cir. 1958)

51 Uviller, Supra, fn 41

52 United States v. MacDonald, 102 S. Ct. 1497 (1982)

53 Id.

54 A brief synopsis of the major cases decided by the United States Supreme Court are contained in Appendix C, with the case names and citations found in Appendix C and the Bibliography, respectively.

CHAPTER III

THE CHARTER AND s.11(b): A PROPOSED INTERPRETATION

A. Introduction

Section 11(b) of the Canadian Charter of Rights and Freedoms reads as follows:

> 11. Any person charged with an offence has the right
> (b) to be tried within a reasonable time;

In analyzing section 11(b) of the Charter and its subsequent interpretations, the procedure used will be to break down the section's components, with a brief review of the Canadian cases decided on each point. Added to that will be the interpretations of Article 5(3) and 6(1) of the European Convention, the American Constitution's Sixth Amendment, as well as the Canadian pre-Charter common law. Finally, the major emphasis will be to discuss what should be the interpretation of each component, with a goal of developing a set of rules to determine what the "right to be tried within a reasonable time" is.

B. Who Is "Any Person"?

Any person, under section 11(b), has the right. Clearly, this covers all humans, despite differences in race, religion, sex, age or nationality. But does it cover corporations, societies, associations and the host of creatures created by statute?

Looking at the discussion of the term in the Special Joint Committee On The Constitution of Canada Proceedings, "any person" was changed from "anyone".[1] The amendment was not made however, to exclude corporations, as the Honourable Jean Chretien explained:

> ... it is only a question of style, in order to avoid <<il et/ou elle>>, in French or <<he and/or she>> in English. It is purely and simply a matter of editing ...[2]

The term "any person" has been interpreted by the British Columbia Court of Appeal in Re PPG Industries Canada Ltd. and A.G. of Canada.[3] There, the corporation, charged under the Combines Investigation Act, made an unsuccessful application to be tried by judge and jury. The company then sought a declaration that the section under which they were charged was inconsistent with section 11(f) of the Charter.[4]

Defence counsel argued that while a corporation could not be imprisoned, the penalty for that offence was a maximum of five years for an individual. They argued that the right applies to the offence, and not to the person. In other words, they argued that the right to a jury trial guaranteed by s.11(f) becomes effective notwithstanding the person charged is a corporation.

The majority of the court held that while some of section 11's rights can apply to a corporation, others cannot. As a corporation cannot be imprisoned, they held that the right to a jury trial was a right that did not extend to a corporation. However, Seaton, J.A., dissented, holding that the Charter "classifies offences, not offenders".[5]

The Alberta Court of Appeal in R. v. Big M. Drug Mart Ltd.[6] held that s.2(a) of the Charter (freedom of conscience and religion) can be invoked by a corporation. However, s.2(a) uses the term everyone, with the majority holding that its meaning is wider than person, and held the term anyone includes corporations. While two Justices dissented, they were silent on the issue of whether a corporation could invoke s.2(a).[7]

In R. v. Panarctic Oils Ltd.,[8] de Weerdt, J., held that with respect to s.11(b):

> ... I presume that a corporation such as the applicant is entitled to that right, just as much as a natural person.[9]

While no rationale is given in Panarctic other than a presumption, other cases have held that corporations are included in the term "any person". Re Balderstone and The Queen,[10] a Manitoba Queen's Bench decision, affirmed by the Manitoba Court of Appeal, cited with approval Union Colliery Co. v. R., which held that "'Everyone' is an expression of the same kind as 'person', and therefore includes bodies corporate unless the context requires otherwise."[11] The court also points out that failing to extend such protection would create a two-tier system of substantive and evidentiary provisions; a system that would be faced if corporations were clearly excluded.

A corporation was extended protection under s.8 of the Charter,[12] but again, this refers to "everyone" rather than "any person". In Century Helicopters Inc. et al. v. Her Majesty the Queen and Corporal Thorton,[13] the court appears to accept that corporations have standing to argue a breach of s.11(b). In this case, the defence motion to stay the charges was dismissed on other grounds. A clear pronouncement on the meaning of the term "any person" in s.11(b) has yet to be made.

(i) How Should "Any Person" Be Interpreted?

Any person should include both incorporated and unincorporated bodies charged with an offence. Many of the same evils may befall a corporation tried after undue delays as an individual. Difficulty in preparing a defence and continued suspicions affecting business are but two. If the legal fiction that the mind of the corporation is comprised of its directors is considered, then the anxiety accompanying an outstanding criminal charge can further be increased by undue delay and adversely affect the corporation's mind.

Further support for this proposition exists in the pre-Charter common law and statutory interpretation doctrines. The court in Big M. Drug Mart Ltd. refers to the United Kingdom's Interpretation Act, which defines person as including a body of persons corporate or incorporate. The Supreme Court of Canada has also held that the word "person" in a public statute includes a corporation.[14] Finally, the French version of the word "person", which is "personne", means "person or artificial person, body corporate deemed fictitiously a natural person and permitted to go to law".[15]

No U.S. Supreme Court decision has adjudicated the issue of whether a corporation as an accused is entitled to the speedy trial right. From the decisions of the Supreme Court and lower courts, it is clear that corporations are considered persons and entitled to the protection of the due process clause in the Fourteenth Amendment, but generally not entitled to the protection of the due process clause in the Fifth Amendment.[16] The distinction has been made between due process which affects "liberty", and due process as it affects property rights. Corporations have been extended protection in the latter situation, but not the former.[17] The Convention offers little assistance in that the term "everyone" is used. Further, "everyone" under the Convention is entitled to Article 6(1) protection in criminal and civil proceedings.

C. "Charged": (When & What)

The meaning of the word charged, and at what time a person is charged, will undoubtedly be one of the most litigated problems in the section, second only to what a reasonable time is. An examination of what is meant by the term charge, and what affect pre-charge delay has will be made. An attempt will be made to define when a person is charged and when a person should be considered charged.

Two distinct interpretations have been given to the meaning of the term charged in the context of s.11(b). The first, and possibly the more natural reading of s.11(b), is that the reasonable time clock begins to run when a person is charged. That is, the person's right to be tried within a reasonable time crystalizes when the person is charged. It appears that this interpretation has received support from a slight majority of the lower court decisions.[18]

In R. v. Antoine,[19] the Ontario Court of Appeal held that in considering s.11(b) of the Charter:

> ... the preferable approach is to examine the entire period between the laying of the initial information and the trial of the accused to determine whether the delay, in the circumstances, was reasonable.[20]

In Antoine, the accused was successful in having her indictment quashed 11 months after she was charged on the grounds that it was insufficient. A new information was sworn and a further 15 months elapsed until the trial. The court held that the date of the initial information was the date she was charged.

In R. v. Boron,[21] Ewaschuk, J., held the same:

> ... the word 'charged' in s.11 of the Charter refers to the laying of an information, or the preferment of a direct indictment where no information has been laid.[22]

Ewaschuk, J., examines three interpretations of the word charged. The first is when a police officer (or private citizen, in certain circumstances) arrests a person without warrant and particularizes the offence with which that person is to be charged. The second time period for a person to be considered charged is the date of the laying of the information or the preferment of a direct indictment, which he adopts. The third is the where the person appears in court to formally answer to a charge. Despite his acceptance of the second time period, he states the following:

> In computing the right to trial within a reasonable time, it is obviously logical that all time from the date of the offence to the date of trial should be considered in that computation.[23]

The interpretation that a person is "charged" on the date the information is sworn is supported by numerous courts, which up to now include lower Ontario courts,[24] the Ontario Court of Appeal,[25] a Saskatchewan Queen's Bench decision,[26] at least one Alberta provincial court,[27] and the Northwest Territories Supreme Court.[28]

Two decisions from the British Columbia Supreme Court have added a strange twist to the issue.[29] In Belcourt, the information was not sworn until 16 months after the alleged incident, and the first appearance was six weeks later. Trainor, J., held that:

> The earliest possible date on which it might be said that he had been charged is the date on which the information was laid.[30]

Later, however, he states as follows:

> On the basis of the use of that language in the Code it is my view that a person is charged with an offence when the justice before whom the information is laid issues process [emphasis mine] to compel the accused to attend to answer the charge alledged.[31]

Doherty states that the test of "issuing process" will be unimportant in most cases, as the "issuing of process will occur a short period of time before the laying of an information".[32] This test is not widely used and is similar to the time of swearing the information.

Another test used, which has little support, is the date the accused appears in court.[33] Thus, an accused could be in a situation whereby he has an information laid against him, and remains unaware of the charge until many months have gone by, and then be called upon to answer the charge. This unsatisfactory test will be reviewed later.

The other major school of thought does not place great importance on when a person is charged. This is crucial, as these decisions are, in effect, holding that pre-charge delay can be considered when evaluating whether a person has been tried within a reasonable time. This school of thought holds that a person only has standing to complain of a violation of 11(b) after he has been charged.

The interpretation which allows pre-trial delay to be considered is discussed in Biggar, which restated defence counsels position that any person charged:

> ... should not be interpreted as providing a starting point for delineating what is or what is not an unreasonable delay, rather it is descriptive of a class of persons who are to be afforded the right of trial without unreasonable delay and that delay in preferring charges is a factor to be considered.[34]

The only case found to date which has expressly accepted this argument is R. v. Dahlem.[35] Again, the reasoning is essential, for it provides a basis to examine pre-charge delay. Without a firm rationale to base this on, it would seem that one would have to overcome the rule laid out in Rourke.

The other rationale for considering pre-charge delay is that it bears on the reasonable time issue. That is, despite the fact the delay occurs before the charge is laid, the person nevertheless has a right to be tried within a reasonable time. Therefore all delay is considered in determining whether the time is reasonable. Many of these decisions state pre-charge delay commits less violence to the right than does post-charge delay, but nevertheless consider it. The courts supporting this interpretation include the Nova Scotia Court of Appeal,[36] Quebec Superior Courts,[37] the Newfoundland Supreme Court Trial Division,[38] the B.C. Supreme Court,[39] the Alberta Queen's Bench, affirmed by the Alberta Court of Appeal, and the Ontario Court of Appeal.[40]

(i) When Should a Person be Entitled to Protection Under s.11(b)?

If we consider the pre-Charter common law up to this point, it appears one is charged when the written complaint is made. In R. v. Chabot, the Supreme Court of Canada stated that:

> ... a criminal charge, strictly speaking, exists only when a formal written complaint has been made against the accused and a prosecution initiated. 'In the eyes of the law a person is charged with a crime only when he is called upon in a legal proceeding to answer such a charge.'[41]

Further, we know from Rourke that the Supreme Court of Canada will not consider pre-indictment delay under the auspices of abuse of process, at least for regularly instituted proceedings.

As was stated earlier, by interpreting the phrase "Any person charged" as meaning a group of people to whom a right extends, we avoid the problem and are legitimately entitled to consider pre-charge delay. How have the other jurisdictions considered pre-charge delay?

(ii) American Jurisprudence Under the Sixth Amendment: Right to a Speedy Trial

> Amendment VI Right to speedy trial, witnesses, etc.
>
> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial ...".

The difference in the American and Canadian wording is apparent. Reasonable need not denote speed. It may be most reasonable for both parties to move slowly through litigation. Indeed, we have discussed the pre-Charter case law that has held a trial commenced shortly after the alleged crime to be an abuse of process. The speedy trial provision does not protect against this injustice; the reasonable time provision does.

The most comprehensive Supreme Court decision discussing the issue of when the speedy trial right applies was Dickey v. Florida.[42] While the question was not in issue in the case, Brennan, J., wrote a thought provoking concurring judgment. He began by examining the purpose of the speedy trial provision. He cites the Supreme Court's reasons in United States v. Ewell,[43] which stated that it "is an important safeguard to prevent undue and oppressive incarceration prior to trial".[44] Further, it minimizes "anxiety and concern accompanying public accusation".[45] He also cites Klopfer v. North Carolina,[46] wherein the Supreme Court also noted that lengthy prosecutions may subject an accused to "public scorn and deprive him of employment, and almost certainly will force curtailment of his speech, associations and participation in unpopular causes".[47]

All of these reasons may impair an accused's defence. Brennan, J., develops this further, by stating that not only may physical evidence disappear and memories fade, but the ability to obtain witnesses and physical evidence yet available becomes more difficult. Indeed, in defences where the issue is one's mental state, "the difficulty is immeasurably enhanced".[48]

Brennan, J., also refers to societal interests which are protected by this right. Delay may not only weaken the government's case, it may allow an accused to commit further crimes. Delay further lessens the deterrent value of an accused's conviction. Finally, "The Speedy Trial Clause then serves the public interest by penalizing official abuse of the criminal process and discouraging official lawlessness".[49]

After reviewing the purpose of the right, Brennan, J. then proceeds to summarize the authorities as to when the right applies. Delay between indictment and trial is covered, and there is substantial authority that the right attaches upon arrest. He states that it applies to intervals between separate indictments or between separate trials on the same charge, and that the Supreme Court assumed, but has not decided, that it also covers the period of time between judgment and sentencing. While he could not find any cases dealing with delay during a trial, he found that with some exceptions, the right did not extend to delays that occured before the defendant's arrest or indictment.

Brennan, J., then examines the standard arguments as to why the protection should not extend to pre-indictment or pre-arrest delays, including the fact there is no pre-conviction penalty, such as impairment of his freedom or personal or social disgrace from being an accused. Further, delay need not, by necessity, impair the government's case, but in fact may help it.

He notes, however, that "In related contexts involving other clauses of the Sixth Amendment, we have held that the 'prosecution' of an 'accused' can begin before his indictment."[50] He cites Escobedo v. Illinois, where the Court spoke of the time when the "investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect".[51] He cites the argument that it may be unrealistic, for the purposes of the right, to say a man is not accused when the government has decided to prosecute him and has sufficient evidence to move against him.

He states that deliberate delay by the government to harm the accused constitutes an abuse of the criminal process. He notes that such delay at this stage "very probably reduces the capacity of the accused to defend himself".[52] He states that unlike the government, the accused is unaware of the proceedings and is failing to take steps necessary to his defence. He concludes this point with the following:

> Thus, it may be that for the purposes of the clause to be fully realized, it must apply to any delay in the criminal process that occurs after the government decides to prosecute and has sufficient evidence for arrest or indictment.[53]

Brennan, J. also notes, however, that this does not necessarily mean that the government should be denied broad discretion to determine that its evidence is insufficient, or that it may have other legitimate reasons for delay.[54]

The next decision to consider this issue was United States v. Marion.[55] The majority of the Court held that:

> ... the Sixth Amendment speedy trial provision has no application until the putative defendant in some way becomes an 'accused', an event that occured in this case only when the appellees were indicted on April 21, 1970.[56]

Referring to the Sixth Amendment, the majority held that:

> On its face, the protection of the Amendment is activated only when a criminal prosecution has begun and extends only to those persons who have been 'accused' in the course of that prosecution. These provisions would seem to afford no protection to those not yet accused, nor would they seem to require the Government to discover, investigate, and accuse any person within any particular period of time. The Amendment would appear to guarantee to a criminal defendant that the Government will move with the dispatch that is appropriate to assure him an early and proper disposition of the charges against him.[57]

While three other Justices concurred in the result, they disagreed with the proposition that the speedy trial guarantee did not apply to delay in the pre-indictment stage of a criminal prosecution.

> The Sixth Amendment, to be sure, states that 'the accused shall enjoy the right to a speedy and public trial.' But the words 'the accused', as I understand them in their Sixth Amendment setting, mean only the person who has standing to complain of prosecutorial delay in seeking an indictment or filing an information. The right to a speedy trial is the right to be brought to trial speedily which would seem to be as relevant to pre-indictment delays as it is to post-indictment delays.[58]

The minority cites three British cases that support the proposition that pre-indictment delays are to be considered by the courts in motions to dismiss.

> Lord Mansfield held in Rex v. Robinson, 1 Black. W. 541, 542, 96 Eng. Rep. 313 (K.B. 1765), that the issuance of an information was subject to time limitations: 'If delayed, the delay must be reasonably accounted for.' In Regina v. Hext, 4 Jurist 339 (Q.B. 1840), an information was refused where a whole term of court had passed since the alleged assault took place. Accord: Rex v. Marshall, 13 East 322, 104 Eng. Rep. 394 (K.B. 1811).
>
> Baron Alderson said in Regina v. Robins, 1 Cox's C.C. 114 (Somerset Winter Assizes 1844), where there was a two-year delay in making a charge of bestiality:
>
> > 'It is monstrous to put a man on his trial after such a lapse of time. How can he account for his conduct so far back? If you accuse a man of a

> crime the next day, he may be enabled to bring forward his servants and family to say where he was and what he was about at the time; but if the charge be not preferred for a year or more, how can he clear himself? No man's life would be safe if such a prosecution were permitted. If would be very unjust to put him on his trial.'[59]

Further, the minority had reference to the different procedures used by the English courts in historical times; the procedures that the framers of the Constitution were familiar with, such as private prosecutors who commenced a lawsuit, and then filed an application for criminal prosecution or rule nisi, calling on the defendant to show cause why he should not be imprisoned. The minority concludes the point by stating that this procedure, known to the framers, "conceived of a criminal prosecution as being commenced prior to indictment",[60] and that:

> ... the individual charged as the defendant in a criminal proceeding could and would be an 'accused' prior to formal indictment.[61]

The minority further notes that:

> Undue delay may be as offensive to the right to a speedy trial before as after an indictment or information.[62]

The minority notes that a speedy trial may be the only way to exonerate oneself from suspicion. Further, the loss of evidence, memory and alibis are also to be protected against. While noting the majority's pronouncement in Beaver that "The right of a speedy trial is necessarily relative",[63] the minority states that:

> ... it is precisely because this right is relative that we should draw the line so as not to condone illegitimate delays whether at the pre- or the post-indictment stage.[64]

The minority further cites Miranda v. Arizona,[65] to support the proposition that other Sixth Amendment rights have been extended to an accused, where neither an arrest nor indictment had been undertaken.[66] In Miranda, the right to counsel was violated, and the Court was unconcerned whether an arrest or indictment was necessary for a person to be an accused.

The minority concluded by stating that had the crime been of a simpler nature, they would have held that the speedy trial right had been violated. However, noting this was a complex case, and further stating that to dismiss would give extraordinary advantages to organized crime and criminals using complex schemes, they ruled that the delay did not violate the speedy trial clause, unless actual prejudice was demonstrated. As it wasn't, the minority concurred in the result.

Other Supreme Court decisions appeared to be solidifying the majority's view in Marion. In Hoffa v. United States,[67] Stewart, J., held that the former Teamster boss had no right to be arrested or have a prosecution commenced against him, and therefore had no constitutional complaint over the duration of the pre-accusation preparation of his case. In United States v. Lovasco,[68] the Court held that pre-indictment delay is to be considered under the due process clause rather than the speedy trial clause.

The Court was split again, however, when the case of United States v. MacDonald,[69] was pronounced. MacDonald was an army doctor who was tried and acquitted of murder by a military tribunal. After a 2 1/2 year delay, the civilian authorities prosecuted and MacDonald was convicted. The majority held that the speedy trial clause has no application when the government, acting in good faith, formally drops charges. The speedy trial time period did not begin to run, therefore, until the civilian authorities charged MacDonald.

The minority dissent in MacDonald was given by Marshall, J., and concurred in by Brennan and Blackmun, J. J.

In a dissent foreign to Canadian courts, portions of the majority's decision are referred to as "facile", "simple", "entirely unrealistic", "absurd" and "senseless". Indeed, in summing up the majority's opinion, the minority brands it as a "disappointing exercise in strained logic and judicial illusion".[70] Unfortunately for the majority, the minority's arguments and clear thought support their contentions.

The minority begins by taking a closer look at the facts, because, as they put it, "the majority scants the relevant facts in the case."[71] They held there were numerous avoidable delays.

> Although supplemental reports were transmitted in November 1972 and August 1973, the Court of Appeals found that 'no significant new investigation was undertaken during this period, and none was pursued from August 1973 until the grand jury was convened a year later'. MacDonald I, 531 F. 2d at 206. Indeed, the United States Attorney for the Eastern District of North Carolina recommended that the matter be submitted to a grand jury within six months of June 1972, and in 1973, the CID suggested the convening of a grand jury before it conducted further investigation.[72]

The minority further noted that MacDonald, aware of the fact investigations were still ongoing, submitted to an interview with CID and offered to submit to more in order to expedite the process. The Justice Department declined to interview him or advise him when the investigation would be over. Further, the minority noted that there was no legitimate reason for the delay, not even crowded dockets. They cited from the Court of Appeal decision to the effect that the delay from June 1972, to January 1975, appeared to be primarily for the government's convenience. They noted the Assistant U.S. Attorney for the Eastern District of North Carolina was even harsher, stating the government knew of the tangible evidence since 1970, but was not fully analyzed by the F.B.I. until the latter part of 1974. He stated the F.B.I. delay was the result of government bureaucracy.

The minority then refers to the Sixth Amendment and its natural meaning.

> On its face, the Sixth Amendment would seem to apply to one who has been publicly accused, has obtained dismissal of those charges, and has then been charged once again with the same crime by the same sovereign. Nothing in the language suggests that a defendant must be continuously under indictment in order to obtain the benefits of the speedy trial right. Rather, a natural reading of the language is that the Speedy Trial Clause continues to protect one who has been accused of a crime until the government has completed its attempts to try him for that crime.[73]

The minority then disputed the majority's reasoning in distinguishing Klopfer.[74] In that case, the prosecutor used a procedure which suspended the indictment indefinitely. As the prosecutor was entitled to restore the case to trial without further order of the court, the majority held that the charges against the accused were never dismissed or discharged in any real sense, so they held the speedy trial guarantee continued to operate. The minority held, however, that the prosecutor was:

> ... required to take affirmative steps to reinstate the prosecution; no charges were actively pending against Klopfer. The Court nevertheless held that the speedy trial right applied.[75]

Futhermore, the minority took a different view of Marion. The majority held that as Marion stood for the proposition that the speedy trial clause does not apply to the period before arrest, indictment or official accusation, it applied in this situation, as the Justice Department (possibly a different sovereign than the Army) had never arrested, indicted or officially accused MacDonald. The minority, however, stated that:

> ... the Court hardly suggested that after the first official accusation has been made, the dropping of charges prior to a second official accusation wipes the slate clean.[76]

Further, the minority alludes to the reasoning behind Marion and distinguishes it from the present case. There, the Court realized the procedural difficulty in inquiring into when the police could have made an arrest or when the prosecutor could have first brought the prosecution. Here, they note there is no such problem, as the speedy trial right "should attach from the date of the initial accusation, a date which is simple to determine".[77]

The minority then describes the fundamental speedy trial policies, which it states the majority also plainly ignores. The minority states that MacDonald's anxiety remains because the public accusation "does not disappear simply because the initial charges are temporarily dismissed".[78] The public awareness of the accusation, the threat of another prosecution, the continued expense of attorneys throughout, lead the minority to brand the majority's statement that the accused is in the same situation as any other person under criminal investigation as simply absurd.

The minority states the majority's decision that a dismissed indictment eliminates speedy trial protection not only runs counter to the language and policies of the right, they also label it senseless. The government can always argue that the delay between two successive prosecutions is legitimate, if in fact there are legitimate reasons. As the minority states, "No purpose is served by simply ignoring that period for speedy trial purposes".[79] As well, the minority noted that the Court of Appeal:

> ... suggested that the government may have proceeded on the assumption that pre-indictment delay would be of no speedy trial consequence. MacDonald I, 531 F. 2d 196, 206 n.17. I fear that, as a consequence of today's decision, unreasonable and unjustifiable delay between prosecutions may become commonplace.[80]

As a result of the lack of any legitimate reason for the 28 month delay and the fact that MacDonald "vigorously" asserted his right to a speedy trial, indicating he had suffered serious personal prejudice,[81] it appears the minority would have ruled in MacDonald's favour. Further, while the minority notes proof of actual prejudice is not necessary to substantiate a speedy trial violation,[82] the minority found signs of actual prejudice. A woman described by MacDonald as the murderer, who had admitted to the murders, subsequently changed her testimony and stated she had no memory of the night in question, in contradiction of earlier out-of-court statements. Further, the minority noted the inevitable coaching of government witnesses lessened the defence's ability to cross-examine as time went by. For the above reasons, the minority would have affirmed the decision of the Court of Appeal.

(iii) The European Convention Position

Article 6(1) reads as follows:

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

The European Commission has held that a person is "charged" with an offence when the "situation of the person concerned has been affected as a result of the suspicion against him".[83] The Commission, citing Neumeister,[84] held the term charge could not be construed in the terms of the domestic law of the contracting state, but that it must be interpreted independently. They further note that it may be necessary to have regard to the whole system and practice of criminal procedure of the State in order to interpret and thus delimit the notion of charge.

Three possible starting dates have emerged from cases decided by the European Court and Commission. They are the date of the applicant's arrest, the date of the opening or preliminary investigations against him, and the date of the filing of the indictment.

The Commision in Huber stated the following:

> This situation has been held clearly to exist where the defendant has been arrested and remanded in custody on the suspicion of having committed a criminal offence. However, the situation is not so clear where the defendant has not been so deprived of his liberty or where such deprivation has only come about at a later stage when investigations into the criminal offences of which he was suspected were already well in progress.
>
> In these cases it has been considered that the interrogation of the applicant or of witnesses alone is not sufficient to hold that the applicant is faced with a criminal charge within the meaning of Article 6(1) of the Convention. On the other hand, it has been noted that under the Austrian Code of Criminal Procedure substantial enquiries against a suspect are normally carried out at an early stage by the investigating judge following the opening of preliminary investigations and, in previous cases against Austria, both the Court and the Commission of Human Rights have held that with such opening of preliminary investigations the applicant was charged with a criminal offence within the meaning of Article 6(1) of the Convention (see, for example, the Ringeisen case).[83]

The Commission in Huber held that the applicant's situation had not been substantially affected as a result of a suspicion against him until the opening of preliminary investigations, and held that was the date Huber was charged.

It must be remembered however, that the Commission pointed out that the investigation in Huber was directed at his financial situation with respect to the taxation authorities rather than the criminal allegations. Had the interrogations, investigations and seizures been directed towards securing evidence for the criminal charges later brought, the decision would certainly have been different. Other cases such as Crociani and others v. Italy,[86] have held the same.

The definition has undergone certain revisions and elaboration, particularly in Corigliano v. Italy.[87] There, charge was defined as follows:

> ... the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence, it may in some instances take the form of other measures which carry the implication of such an allegation and which likewise substantially affect the situation of the suspect.[88]

(iv) A Test For Canada

How can the Canadian lower court decisions, the American and European jurisprudence, and the pre-Charter and English jurisprudence be reconciled? Should our courts follow the one extreme and mechanically hold that a person is charged when the information is sworn or when process issues, or should they take the other and hold that we must look at all delay following the commission of the alleged offence? Or should they fall somewhere between? It is submitted that the reasons behind s.11(b)'s enactment should be examined to develop a test that best deals with the evils s.11(b) was enacted to defeat.

1. Section 11(b): Its Purpose

Little or no assistance is found in the Proceedings of the Special Joint Committee on the Constitution of Canada. It is clear that at least one senior civil servant informed the Committee that it was his understanding that a person was charged with an offence when the information is laid.[89] It is also clear that the Minister of Justice used, as one of his guidelines in drafting the Charter, the International Covenant on Civil and Political Rights.[90]

This is further supported by the fact that the explanatory notes accompanying the October 5, 1980, version of the Charter stated that s.11(b) was drawn from the provisions contained in the European Convention and the International Covenant. Indeed, had we wished to follow the American jurisprudence, we could have used the term speedy trial, which we did not. By the very fact the draftsmen made reference to the European Convention and International Covenant rather than the United States Bill of Rights, preferential authority ought to be given to the Convention and Covenant jurisprudence over the Bill of Rights jurisprudence.

What are the evils the right to be tried within a reasonable time is attempting to overcome? The problems a person can have by not being tried within a reasonable time are many. The most striking in terms of the administration of justice, however, is the possibility that a long delay will impair the ability of an accused to defend himself. Evidence disappears and memories fade. Witnesses may no longer be available, having moved or died. It further hinders the search for undiscovered witnesses and evidence.

Further, the state has an interest in expeditious trials. One should hesitate to classify this as a right of the state. The Charter does not outline the state's rights. Society's interests, however, are in line with this right. The state itself has the burden of proof in criminal cases, and the loss of evidence and memories prejudices its case just as it does the defence. As Brennan, J. so succintly put it in Dickey v. Florida:

> The public is concerned with the effective prosecution of criminal cases, both to restrain those guilty of crime and to deter those contemplating it ... Moreover, while awaiting trial, an accused who is at large may become a fugitive from justice or commit other criminal acts. And the greater the lapse of time between commission of an offence and the conviction of the offender, the less the deterrent value of his conviction.[91]

The individual also has other interests in being tried within a reasonable time outside of the problem of impairing one's defence. It is "an important safeguard to prevent undue and oppressive incarceration prior to trial [and] minimizes anxiety and concern accompanying public accusation".[92] Another evil it counters is that the:

> ... pendency of the indictment may subject him to public scorn and deprive him of employment, and almost certainly will force curtailment of his speech, associations and participation in unpopular causes.[93]

Further, as outlined by the U.S. Supreme Court in Smith v. Hooey,[94] even a serving prisoner can feel the adverse effect of delayed proceedings by:

1. losing the right to serve a sentence concurrently;
2. loss of rights and privileges (i.e. no right to pardons, loss of rights in prison); and

3. decreases the ability to mount a defence, particularly as the accused is in jail and unable to contact and search for evidence and witnesses.

Once suspicion has been cast, a public trial may be the only way to exonerate oneself. Finally, the right to be tried within a reasonable time may be used to deal with improper state conduct. The delay of proceedings in hopes that the defence will weaken or that a defence witness will die is unacceptable. While perhaps other reasons can be presented to support the right, we will now examine how all of these interests can best be accommodated.

2. Date Information Laid

This date gives very little protection for the interests sought to be defended. If the information is laid well after the offence has been committed, and the police or state, through either negligence or mala fides fail to lay an information, the defence stands a good possibility of being impaired. By choosing this date our courts cannot patrol pre-indictment negligence or pre-indictment bad faith. Our courts may very well lose the ability to punish and restrain overzealous government officials by refusing to proceed in the face of mala fides tactics.

Limiting oneself to the laying of the information or preferment of the indictment also fails to proctect the interests of society. Pre-indictment delay, either negligent or intentional, continues to leave criminals at large, either to escape justice entirely or to commit other crimes. Finally, the greater the time between the alleged offence and the conviction, the less the deterent value. Here, pre-indictment delay can adversely impact on society's interests, yet our courts are unable to patrol this time frame with the suggested test.

Finally, the anxiety, concern and apprehension the accused faces is not controlled well with this test. If the accused only learns of the pending litigation at the time the information is sworn, he is protected, in that he has suffered no adverse effects. However, what if a police investigation is occuring for a long period of time before the information is laid? What are the affects on a person who continues to be investigated? His friends, family, co-workers and employers may be questioned, raising suspicions he is guilty of an offence, and certainly raising suspicions he is involved in an offence. He may lose his job, or may not receive the same promotions or advancements. Again, when this pre-indictment delay affects an accused in this manner, the test we are referring to offers no protection.

Finally, what happens if a long pre-indictment delay damages the prosecution's case, as it may? Let us assume that the only reason for this is that the crime was well-concealed. It must be reasonable to assume that an accused may never be able to argue pre-indictment delay in their favour as the result of their cleaverness in concealing the crime. Let us further assume that the only evidence that leads to the indictment is a confession, and that the accused is indicted shortly after, but the trial is set down close to the reasonable time limit. Let our final assumption be that the accused's confession is in danger of being inadmissable, or that other evidence has been lost or a valuable witness dies, and the state needs an adjournment to seek out more evidence. Under the information laid definition of a charge, the state would not be allowed to argue that the pre-indictment delay is relevant to the adjournment. Surely, this hinders the administration of justice. It is respectfully submitted that the test does not come close to accomplishing the goals of the right to be tried within a reasonable time.

3. A Proposed Test: A Flexible Approach

To reach the goals of the right, our courts should use a flexible approach. Further, pre-indictment delay should be considered when some of the right's goals are in jeopardy.

One of the goals sought by the right is that the defence shall not be impaired. Clearly, undue pre-indictment delay can imperil a defence. Further, consideration of pre-indictment delay allows the courts to monitor abusive state conduct. To abdicate the role of protecting individuals in the face of blatant police or prosecutorial abuse is nothing short of shocking. These goals of the right go unheeded with the information-laid test; they are protected by considering pre-indictment delay.

The test which best meets the goals of the right is as follows:

> "When the situation of the person concerned has been affected as a result of the suspicion against him".[95]

This is the test our courts should use in determining when one is charged. This test provides protection to the person who needs it. We do not give indigents the right to counsel if there is no reason. We do not supply interpreters to people who do not need them. Why then, should we not provide the right to be tried within a reasonable time to a person whose situation is being affected as a result of the suspicion against him? The goals of s.11(b) are best met by this test.

The rights holder is, at this point, in need of protection from the adverse effects inherent in long proceedings. When investigations begin, the accused usually has his situation affected. The anxiety of a unduly prolonged investigation can now be guarded against. The public scorn of being a prime suspect can also be guarded against. Further, unduly prolonged investigations which disrupt the family, friendship and employment relationships would now be under the purview of the right. The punitive effect such prolonged investigations may have on other associations, the individual's free speech and participation in unpopular causes would also be protected.

While the suspicion aroused by an unduly prolonged investigation may cause a loss of employment or a loss of promotion, legal costs are undoubtably increasing to the prudent person attempting to mount as best a defence as is possible. Again, a swift trial may be the only method for one who has a cloud of suspicion cast over him to exonerate himself. All of these interests are protected by this test; they are not protected by the information laid date.

Further, many of society's interests could now be protected. Some may argue that society was not given the right to try within a reasonable time, but rather the duty to try within a reasonable time. While this may be a fair argument, should we not choose a definition or test which can most readily accommodate society's interests over one that conflicts with them? It is submitted that the test, if possible, should accommodate those interests. Here, the test is clearly superior to the information laid test.

As was stated earlier, the greater the time lapse from the commission of the offence to the date of verdict, the lesser the deterrent value. Society has a vested interest that will remain unprotected without some pre-charge considerations. Further, society's interests in retribution, compensation and ensuring criminals are no longer at large and brought to trial are also met by this test. The situation affected test is proposed over the date of the offence test, as the authorities may remain unaware of the commission of the offence for some time. The state cannot be held liable for failing to uncover a cleverly diguised crime. However, once discovered, society has a legitimate right to demand a speedy disposition of the matter. The earliest they can reasonably ask for this is when an investigation focuses on the suspected perpetrator, which is usually the date the situation of the accused becomes affected.

Outside of the Canadian authorities already referred to under s.11(b) advocating scrutiny of pre-indictment delay, other consitutional jurisprudence supports examination of pre-indictment delay. The European Convention, which our Charter is modelled after, uses the situation affected test, which does include pre-indictment delay. The Judicial Committee of the Privy Council recently interpreted a similar clause under the Jamaican Constitution.[96] There, s.20 read as follows:

> Whenever any person is charged with a criminal offence he shall ... be afforded a fair hearing within a reasonable time.

Despite the fact the right here appears to apply only where a person is charged, the Privy Council was of the view that pre-indictment delay had to be considered.

Lord Diplock stated that the passage of:

> ... 3 1/2 years after the event that gave that rise to the charges ... would not, in the ordinary way, have been 'a fair hearing within a reasonable time' as is required by section 20(1) ...[97]

While the majority decisions in the U.S. do not consider pre-indictment delay under their speedy trial right clause, it could be argued that their jurisprudence is based on a section less similar to ours than the European Convention or the Jamaican Constitution. Further, one can argue the more reasoned dissents and dicta in the those cases, particularly Brennan, J., in Dickey and the minority in Marion. One can always argue the pre-Charter abuse of process cases, which have at least modified and distinguished Rourke, as well as the dicta from Krannenberg.

D. "With an Offence": What is "An Offence"

From the Special Joint Committee on the Constitution of Canada Proceedings, the drafters stated that an offence "deals with federal offences [and] it deals with provincial offences.[98] It therefore covers not only Criminal Code offences, but other federal statutes. The same is true for all provincial statute offences. But what about regulatory boards or associations empowered to take action against its members? Are these offences under s.11(b)?

Morris Manning, Q.C., in his text entitled Rights, Freedoms and the Courts,[99] states regulatory offences are covered by this section. While citing no authority for this proposition, he comes to this conclusion as the result of comparing the Charter with the European Convention. There, as he notes, the restrictive term used is any criminal charge. He cites a Convention case where the right was held to extend to criminal charges under the ordinary penal code but not to civil servants charged with disciplinary offences.

Manning states that:

> The difference in wording between the Charter and the Convention illustrates the intent by the drafters of the Charter to have section 11 cover all offences and not just criminal offences.[100]

It should be remembered, however, that the European Convention's Article 5(3) (right to trial within a reasonable time or release pending trial) applies to everyone arrested or detained pursuant to Article 5(1)(c), which allows arrest and detention on the reasonable suspicion of a person having committed an offence. This proves of little assistance however, as most regulatory bodies, such as law societies, nursing and medical associations, do not have the power to arrest or detain an accused.

In Konig,[101] the Commission held that Article 6(1) did provide protection against dilatory proceedings against a doctor facing license suspension. This case was later affirmed by the Court and the Committee of Ministers. However, the Commission held that the protection is extended by the right in Article 6(1) to have one's "civil rights and obligations" determined in a reasonable time. This is not contained in s.11(b) of the Charter.[102]

The American decisions are of little assistance as well. It specifically limits the speedy trial right to "all criminal prosecutions". The Canadian common law position offers limited assistance. Some cases have held that an "offence" applies only to a federal statute, but those were in direct relationship to the right of a police officer to arrest.[103]

In R. v. Howard,[104] the court held that where a person deliberately leads police to believe another person has committed a provincial offence, that person is guilty of public mischief. For the purposes of s.128 of the Criminal Code (1970), offence "is the equivalent of a 'breach of law involving penal sanction'".[105] The court held that the "offence", in this respect, included "a breach which is contrary to a federal law, or a provincial law, or otherwise".[106] This definition, however, only defines what is already known, meaning federal and provincial offences.[107]

The only other definition in the Charter cases is the one previously examined in determining when one is charged. There, the courts have held it was either on the date the information was laid or when the indictment is preferred. If this definition is used, one is never charged with regulatory offences by information or indictment. If we use the other interpretation, that being that a person charged with an offence only defines the status of one who has the right to be tried within a reasonable time, the problem of interpreting what an offence is still remains.

(i) Defining an Offence

If one examines the evils the right was meant to combat, the right should extend to proceedings of administrative boards that can levy penalties or restrict freedoms for offences under its mandate. The evils the right was meant to alleviate may all be suffered by a person in this situation. The anxiety, public scorn, affect on family, friends and the person's employment remain. Certainly, these proceedings will curtail one's associations. As well, society's interests are protected by this interpretation. The deterrent value and protecting society from incompetent or malicious behavior would be patrolled. Further, protecting individuals from arbitrary or abusive procedures could also be guarded against. Finally, prolonged proceedings can impair the individual's ability to mount a defence as easily as it can with federal or provincial offences. An administrative board, empowered to determine whether one's conduct amounts to conduct deserving sanction, and with the power to levy sanctions, either by monetary fine or suspension of priviledges, should be subject to s.11(b).[108]

However, two cases have held that the term "offence" does not include disciplinary proceedings. In Re James and Law Society of British Columbia,[109] the British Columbia Supreme Court held that Law Society disciplinary proceedings are civil in nature, with Murray, J., stating that the petitioner had not been "'charged with an offence' within the meaning of s.11."[110] In R. v. Mingo et al.,[111] Toy, J., held that "inmate offences" and "disciplinary offences" in the Penitentiary Services Regulations, C.R.C. 1978 c.1251, are not "offences" under s.11. Toy, J., held that historically, inmate and disciplinary offences "have not been recognized as offences against public as opposed to private or domestic laws."[112]

The case of Re Feige and Government Board of Denture Therapists,[113] is the only case that implies professional disciplinary proceedings are subject to the Charter. There, the appellant unsuccessfully attacked his conviction of professional misconduct on the grounds that he was forced to give evidence against himself. While the court decided against the appellant on the grounds that the Charter had no retroactive effect, they impliedly accept the notion that professional misconduct allegations are offences for the purpose of s.11(c). If the right's goals are considered, this interpretation is correct.[114]

E. "Has The Right"

It is appropriate now to examine two issues relating to this right. The first is if and when this right must be asserted by the person. Secondly, what, if anything, may constitute a waiver of this right.

It is clear from pre-Charter, American, European Convention and Charter jurisprudence that an active attempt by the defendant to delay his trial may never be used to support a claim that the right has been violated. This proposition is supported by common sense and our notion of justice. Just as delaying tactics may not be used to support such a claim, a cleverly concealed criminal act should never be used in favour of a defendant who claims pre-indictment delay has harmed his defence or prejudiced him. If he is responsible for the delay, he must certainly reap the natural consequences of it.

But what of the defendant who fails to assert his right to be tried within a reaonable time? Does he in fact lose or waive his right? Pre-Charter jurisprudence on the abuse of process issue shows that in general, acquiescence to Crown adjournments does not assist one in claiming abuse of process or prosecutorial laches. Further, the United States Supreme Court jurisprudence clearly shows that while failing to assert one's right does not amount to a waiver of that right,[115] it is a factor to be considered in the inquiry as to whether the right has been violated. The European Convention jurisprudence has rarely touched on this issue, noting it only as a factor to be weighed in the defendant's favour when he has made attempts to speed up the investigations and court procedures. The decided Charter cases to date have placed various degrees of emphasis on the assertion of this right.[116] Most cases, however, clearly recognize it as a matter to be considered.

(i) The Role of Demand and Waiver: Do We Need It?

As was noted in the pre-Charter review, consent to Crown adjournments will usually weigh against the defendant arguing an abuse of process. This appears to limit one's ability to argue an abuse of process only to a point. Once the delay becomes too great, Canadian courts have found an abuse of process despite the defendant's consent to all or most of the adjournments.

Most of the decided Charter cases have used the demand or assertion of right factor in the balancing process. This is adopted from Barker v. Wingo,[117] where Powell, J., speaking for the majority, refers to the demand waiver doctrine.

> The demand waiver doctrine provides that a defendant waives any consideration of his right to speedy trial for any period prior to which he has not demanded a trial. Under this rigid approach, a prior demand is a necessary condition to the consideration of the speedy trial right.[118]

Powell, J., rejects this doctrine, citing many of the reasons given by Brennan, J., in Dickey. He further cites the American Bar Association Project on Standards for Criminal Justice, which argues that the defendant may not be aware of the necessity to demand a speedy trial, as well as the conflict with the public interest in the prompt dispositon of criminal cases.

> The trial of a criminal case should not be unreasonably delayed merely because the defendant does not think that it is in his best interest to seek prompt disposition of the charge.[119]

He then accepts the rule that the defendant's assertion, or failure to assert his right to a speedy trial, is one of the "factors to be considered in an inquiry into the deprivation of the right".[120] The rule still "places the primary burden on the courts and the prosecutors to assure that cases are brought to trial".[121] The approach the Court accepts is a "balancing test, in which the conduct of both the prosecution and the defendant are weighed".[122]

The reasoning behind it is that in general, delay works in favor of the accused.[123] It is therefore considered unfair for the defendant to take advantage of delay without objection and then to argue his rights have been denied without having asserted them.

The Court therefore affirmed Barker's conviction. Powell, J., summarized as follows:

> We do not hold that there may never be a situation in which an indictment may be dismissed on speedy trial grounds where the defendant has failed to object to continuances. There may be a situation in which the defendant was represented by incompetent counsel, was severely prejudiced, or even cases in which the continuances were granted ex parte. But barring extraordinary circumstances, we would be reluctant indeed to rule that a defendant was denied this constitutional right on a record that strongly indicates, as does this one, that the defendant did not want a speedy trial. We hold,

> therefore, that Barker was not deprived of his due process right to a speedy trial.[124]

A concurring judgment was delivered by White, J., which was concurred in by Brennan, J. They held that the result would have been otherwise had it not been apparent that Barker "so clearly acquiesced in the major delays".[125] The minority stated the following:

> It is also true that many defendants will believe that time is on their side and will prefer to suffer whatever disadvantages delay may entail. But, for those who desire an early trial, these personal factors should prevail if the only countervailing considerations offered by the State are those connected with crowded dockets and prosecutorial case loads. A defendant desiring a speedy trial, therefore, should have it within some reasonable time; and only special circumstances presenting a more pressing public need with respect to the case itself should suffice to justify delay. Only if such special considerations are in the case and if they outweigh the inevitable personal prejudice resulting from delay would it be necessary to consider whether there has been or would be prejudice to the defense at trial.[126]

The minority cited United States v. Marion,[127] to conclude:

> [T]he major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense.[128]

However, it is appropriate to review the rationale behind it. As Brennan, J., stated in his concurring opinion in Dickey, there are a number of problems with the proposition that delay is welcomed by the accused as it usually operates in his favor. He stated that:

> 1. It is not always true, and may not only hurt the defence, but certainly prolongs the anxiety and financial burden, and
>
> 2. It hurts both side's ability to present their case, and therefore does not inherently benefit either.[129]

He also looks at the right itself. As it is a fundamental right, waiver, which is an intentional relinquishment of a right, is something the courts must indulge every reasonable presumption against.[130] As it is a safeguard for both the accused and society, he doubts that affirmative action is needed to preserve the right, but rather that affirmative action is required to waive it.[131]

Further, as was so patently clear in Dickey, the accused has no duty or power to bring himself to trial. Brennan, J. believes we are misallocating the burden, as the state is responsible and the only one with the power to bring on a trial.[132] Further, as the majority stated in Barker v. Wingo, a trial should not be subject to unreasonable delay simply because an accused does not think that it is in his best interest to seek a prompt disposition of his charge.[133] Finally, an accused may not realize his right to a speedy trial until it becomes apparent that it has come close to being violated. The accused will only then be heard to complain a first time, and will be prejudiced by his failure to complain earlier.

Other factors in the Canadian criminal justice system further compound the problem. Urban centers have a growing backlog of cases, pushing trial dates far into the future. Even with a burgeoning number of young lawyers entering the system, senior criminal counsel continue to receive most of the serious offences, resulting in booked-up calenders far exceeding the court's calenders.

Finally, what of the practicalities of opposing Crown adjournments where the reason is valid? If one fails to oppose it, this failure may be deemed a waiver of the accused's right. Yet to oppose every Crown adjournment would certainly win defence counsel a reputation as being unreasonable. He would not be extended the professional courtesy himself, and would soon run into opposition on all of his defence adjournment applications. Consenting to adjournments is a natural consequence of practising at the criminal bar. To impute a waiver of an accused's rights to him as the result of a lawyer's professional courtesy is unfair to both counsel and client.

(ii) A Proposed Method For Safeguarding the Right

The following principles should apply in relation to the exercise of the right.

1. Waiver of the right should never be assumed from acquiescence. The right is a fundamental protection, and waiver should be express; "a knowledgeable and intentional surrender of the right".

2. Defence adjournments should not be calculated in the "reasonable time period", unless they are the result of police or Crown behavior, such as suprise witnesses or the failure to provide adequate particulars.

In practice, for all courts to measure the reasonableness of the time period and the assertion of the right, a number of pratical proposals should be implemented to protect an accused from undue delay.

It is reasonable for the accused to be informed of his right to be tried within a reasonable time. This could be done in a number of ways. Firstly, law societies could institute a practice whereby all lawyers must inform their clients of their constitutional right. This would protect an accused from an overly busy lawyer who continues to juggle trial dates back and forth to increase profits.

This should also include a statement as to what dates the lawyer has available to represent the accused. This duty falls fairly on the lawyer's shoulders, as they are not only the ones charged with protecting their client's rights, they also profit from the system. This practice could be easily taught in bar admission courses.

Secondly, the court is in the best position to inform indigents, those who wish to act on their own behalf, and those who wish to set a trial date and who state they will be getting a lawyer, of their right to be tried within a reasonable time. For the benefit of other judges who may be deciding on the "reasonable time" issue, it would not be unfair to note on the information the first available date that the matter could be heard. If an accused is unrepresented, he may then seek out counsel to represent him at that time. If he is represented and his counsel is unavailable until some later date, the difference should not be calculated against the Crown or state in the reasonable time calculation.

Defence counsel may assist their clients' case by having matters brought forward if the first appearance is still a month or more away. Indeed, defence counsel may be able to arrange their own case load in order to accommodate the client who wishes a speedy trial. Failure to use these techniques should not be cited as evidence that one did not want a speedy trial, it is merely noted that the defence counsel may be, in practice, of great assistance in speeding up the process.

The courts will undoubtably have to grapple with their own procedures, and may now have to review their own scheduling process. Trials against those in custody should proceed before trials of persons released on bail, as the remand accused is suffering an additional penalty. Further, serious crimes may have to be litigated before minor ones, and matters involving alledged acts far in the past may have to proceed before trials with alledged acts just past. If this does not occur, dismissals on the basis of a violation of the right may follow. Similarily, criminal matters may have to proceed before civil matters. Further, it is fair, as the liberty of citizens is paramount over civil litigation.

The issue of consenting to adjournments and having that fact construed as acquiescence to delay is troubling. Regardless of previous delay, the Crown is generally entitled to an adjournment if they fall within the boundaries of Darville v. The Queen.[134] The courts should place no emphasis on the fact that the accused consents to an adjournment. As we have seen, there are a number of reasons why counsel may consent to an adjournment but still wish for the speedy disposition of the trial. While there may be more weight placed on reasons for the adjournment and subsequent delay if the reasons are good rather than poor, this should be dealt with under "reasonable time". Clearly, an adjournment requires a special application and is permission from the court to delay rather than lose the litigation. The delay should be attributed to the one seeking the adjournment and obtaining the benefits. Finally, waiver should never be assumed unless an express, informed waiver is made. The right is a major one and it ought not to be treated or discarded lightly.

F. "To Be Tried"

When is one "tried"? Is it when the trial itself begins or ends? Is it on final judgment, after all appeals, or after the first conviction or acquittal?

The European Convention offers us great assistance. Not only is the wording similar ("entitled to trial within a reasonable time", European Convention; "has the right to be tried within a reasonable time", Canadian Charter), both documents have two official and equally authoritative languages; French and English. Both languages were resorted to in interpreting the word "trial" in Wemhoff v. West Germany.[135] There, the Court held that the English version permitted two interpretations (one being to be brought to trial, or the beginning of a trial, and the other being tried, or having the matter disposed of.) However, the French version permitted only one, that being "jugee", or judgment. The Court held the following:

> It is true that the English text of the Convention allows such an interpretation. The word "trial" which appears there on two occasions, refers to the whole of the proceedings before the court, not just the beginning; the words "entitled to trial" are not necessarily to be equated with "entitled to be brought to trial", although in the context "pending trial" seems to require release before the trial considered as a whole, that is, before its opening.
>
> But while the English text permits two interpretations, the French version, which is of equal authority, allows only one. According to it, the obligation to release an accused person within a reasonable time continues until that person has been "jugee", that is until the day of the judgement that terminates the trial. Moreover, he must be released "pendant la procedure", a very broad

> expression which indubitably covers both the trial and the investigation.
>
> Thus confronted with two versions of a treaty which are equally authentic but not exactly the same the court must, following established international law precedents, interpret them in a way that will reconcile them as far as possible. Given that it is a law-making treaty, it is also necessary to seek the interpretation that is most appropriate in order to realize the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties. It is impossible to see why the protection against unduly long detention on remand which Article 5 seeks to ensure for persons suspected of offences should not continue up to delivery of judgment rather than cease at the moment the trial opens.[136]

Canada uses the same French term and should adopt this line of reasoning. It is clear both languages are equally authoritative, and the term should be interpreted in a way that will reconcile both versions. Further, it is also clear that the courts should do all in their power to interpret the Charter in order to realize its goals and objectives rather than to restrict the obligations of the state to the narrowest possible.

American law does not offer as much assistance, as it appears the specific issue has not been considered by the Supreme Court.[137] The other question is when is judgment?

Is it judgment at first instance or at final appeal? Does the right to be tried include appeal procedures?

To obtain the goals of the right, judgment should include appeal procedures. The "jugee", or judgment, is not final until it has reached the highest possible stage of the court system. If one examines the goals behind the right, it is apparent that they too are best served by defining "to be tried" as the final verdict. Upon a reversal of a decision and a subsequent second trial, undue delay may impair both the defence and the prosecution's case. Failure to include this time period would prevent the court from monitoring Crown or police behaviour which proves to be malicious. The anxiety, cost and adverse effect on employment, family and friends continues with no relief if the courts abandon their power to review this period. Finally, society's interests are not protected if the courts fail to consider this time period. A criminal back in society as the result of an error by a lower court judge is as terrifying as the situation of an innocent man convicted by appealable error. Neither situation should be allowed to be unduly protracted. The power should be exercised by the courts under s.11(b) to protect individuals against unreasonable delay up to the final verdict, whether that be at the various Court of Appeal levels or the Supreme Court of Canada.

Article 6(1) of the European Convention has been held to protect individuals up to the point of final judgment. This is not to be confused with Article 5(3) of the Convention, which ends the period of remand upon initial conviction and thereafter treats the person as a serving prisoner and unentitled to Article 5(3) protection. The major reasoning behind the European interpretation appears to be the French version "jugee", meaning final judgment. The European Court also noted in Wemhoff that:

> There is furthermore no reason why the protection given to the persons concerned against the delays of the courts should end at the first hearing of the trial ...[138]

In more recent cases, the European Commission has held the protection of Article 6(1) extends to the point where the accused is:

> ... no longer affected by his being the subject of a criminal charge. This is the case when a decision has been arrived at on the charges in the form of an acquittal or a conviction, even if this decision is given by a court of appeal deciding on the charge.[139]

The latest pronouncement on the issue came in Eckle v. The Federal Republic of Germany.[140]

> In the event of conviction, there is no 'determination ... of any criminal charge', within the meaning of Article 6(1), as long as the sentence is not definitively fixed. Thus, in the Ringeisen judgment the Court took as the close of the proceedings the date on which the trial court had decided, following appeal proceedings, that the entire period spent by the applicant in detention on remand should be reckoned as part of the sentence.
>
> Consequently, the period to be taken into account ended on 23 January 1978 when the Koblenz Court of Appeal delivered its judgments upholding the cumulative sentences pronounced by the Regional Court on 24 November 1977.
>
> The Cologne proceedings, for their part, came to a close on 21 September 1977 when the Regional Court ordered discontinuance of prosecution.[141]

It is suggested that the European Convention jurisprudence, the plain reading of the French version, and an examination of the goals of the right all support the proposition that a person is tried when they receive final judgment.

G. "Within a Reasonable Time"

What is a "reasonable time"? Undoubtably the most difficult concept to define precisely, it is not foreign to Canadian courts. Our negligence tort law developed the standard of the "reasonable man". Reasonable is defined in

Webster's as being "within the bounds of reason, not extreme, not excessive." Reasonable is, by its nature, comparative. What time period is reasonable for one set of facts may be unreasonable for another. The only assistance on the actual time period that Canadian courts will receive from jurisprudential sources is the pre-Charter case law on abuse of process.

This is so for two reasons. The first is that, by its very nature, the European and American systems are very different from ours. The European Convention governs systems which have pre-investigation stages by both police and the courts. The time period for some of the investigations extends past 17 years. The Americans also have a complex appeal procedure, which can continue an appeal for a decade.

The second reason for using Canadian pre-Charter jurisprudence is that it provides us with a rough guide-post as to what is reasonable. Judges know how long it usually takes to bring a matter to trial. Most have been lawyers, and have an intimate knowledge of what a reasonable time is. Furthermore, the abuse of process cases show us what an unreasonable time is. In the Canadian context, it is our only reference point.

(i) *Length of the Delay*

This is usually the first issue to be considered by those contemplating s.11(b). It has been treated as a form of "triggering mechanism" in the United States. That is, the question of whether one has been denied the right to a speedy trial is not considered until there exists a period of time which, unexplained, *prima facie* violates the right to a speedy trial. In *Barker* v. *Wingo*, the Court held that this delay must be so long that the defendant is *presumably prejudiced*. While the length of the delay must be looked at, using the test of "presumably prejudiced" is a poor one with little value. The three immediate criticisms that come to mind are as follows.

Firstly, "presumptions are matters of law independent of variable facts or circumstances".[142] As Professor H. R. Uviller points out:

> Moreover, as actual prejudice is later described a period sufficiently long presumptively to constitute oppression and endanger the integrity of the defense would be considerably longer than that following which the defense appropriately may demand justification for the delay. In addition, by waiting for the presumption of prejudice to arise, the defence may be taxed with the rejoinder of acquiescence or waiver.[143]

Secondly, and just as important, our right is not the right to a speedy trial; it is the right to be tried within a reasonable time. It may be that in the circumstances, some delay is reasonable to help both the Crown and defence prepare their case. In fact, as we have seen from some of the pre-Charter cases, some trial dates set too soon after the offence were deemed to be unreasonable and abusive. The test of presumably prejudiced does not consider the other side of reasonable time, that being a trial too soon.

Finally, as a presumption is a matter of law and independent of variable facts or circumstances, it is of no assistance in determining reasonableness, which by its nature is dependent on its facts. A three month delay may be unreasonable if the accused presses for an early trial as a result of the fact his two alibi witnesses are dying from cancer. If he cannot prove actual prejudice when both die, and as a three month delay does not presumably prejudice the defence, it appears the defendants claim would not get past the first stage.

The courts should discard this notion and simply look at the length of the delay. If it is three months and there are no circumstances such as the ones mentioned above, the court will undoubtably find no breach. They will simply state that it fell within the reasonable time period. By always looking at the actual time period, we will continue to safeguard the rights of those caught in peculiar circumstances. The Convention jurisprudence has not developed a "presumptive prejudice" test.

(ii) Reasons for the Delay

This is the one factor all jursidictions review. In general, the reasons for delay have been categorized under three heads. The first is delay resulting from the conduct or at the behest of the accused. These delays are never weighed against the state. It is the accused who is responsible for the delay and he must bear the responsibility for it.

The only time an accused's adjournment should weigh against the state is when the state is responsible for, in a direct or indirect fashion, the delay. Such a fact situation could occur, for instance, where evidence has been withheld from the accused and where an adjournment is needed to off-set the surprise. Another variation of this situation could be where the Crown withholds case law from the accused, who requires an adjournment to study the law. Of course, the state should equally not have time run against it if it has evidence or case law withheld from it, requiring a Crown sponsored adjournment application.

The second category is often classified as "neutral". In Barker v. Wingo, the Court described these reasons as valid reasons, and gave as an example missing witnesses. However, this position was criticized by Professor Uviller, as it did not spell out what was to be done with such delays. Did it mean that the delay was never to be calculated against the state, even if demonstrable harm could be shown? If all it meant was that adjournments should be granted for brief periods for these reasons, the statement was self-evident and unhelpful. Other "neutral" reasons given in Barker include negligence and court congestion.

The only "neutral" reason which should not weigh heavily against the state are delays which are out of the state's control. Such reasons include missing witnesses or ill judges or prosecutors. Even then however, after a number of such uncontrollable delays, the fact that no one is to blame must be outweighed by the potential prejudice to the accused. The right's goal is not to punish wrong-doers who cause delay, but rather to safeguard the person's right to be tried within a reasonable time.

Other "neutral" reasons cited by the United States Supreme Court, such as negligence and overcrowded courts, do not naturally fit into a category that weighs against neither party. While some court congestion is natural, there must be a point where the delay becomes unreasonable. Further, it is the state that is responsible for funding and operating the court system. They are the only ones responsible for such delays, and the only ones with the power to change it. Clearly, the state has the duty to try a person within a reasonable time. It is not unreasonable for the courts to police their own procedures. Their failure to do so would be tacit approval of what may amount to unreasonable delays and an inability to enforce the person's right. Such was never contemplated by the drafters of the section.

Finally, negligence is hardly what one would consider a "neutral reason". This is clearly one interpretation that we should not adopt from the Americans. Just as we do not allow an accused's own negligence (i.e. failing to contact a lawyer until the morning of the trial) to operate in his favor, we should not condone Crown negligence. Whatever the reasons for the delay, it has the same potential for harm. The problem with treating negligent and wilful delay differently is that the courts appear to be placing the burden of showing mala fides by the Crown on the accused. Yet how can he know, let alone show, the reason for the prosecution's dereliction of his case? The only one who does know is the prosecutor and it is he who should bear the responsibility of explaining it. The deterrent value of treating both the same remains; one can be deterred from wilful delay as well as be careful about dereliction of duties. In summary, the only neutral reason should be one in which the Crown or state has no control. Even then, once it reaches a certain point, it must surely lose its neutrality and weigh against the state.

The third category is delay attributable solely to the Crown. This should include wilful or negligent delay. Examples are setting trial dates and asking for adjournments when the Crown knew or ought to have known that the police officer or witness would be on holiday. Other sources of delays include simply failing to be ready.

As was argued earlier, pre-charge delay should be considered. This results in a review of the police investigation, as well as the decision to prosecute. It does not demand a new standard of police officials; it simply requires that they act reasonably and in accord with the Constitution.

A major concern is how delay will be viewed when it is the result of the exercise of an accused's right. Does an accused have to cooperate with the authorities to argue a violation? Or if he uses every appeal and challenge to the proceeding, is this to be treated the same in all proceedings? Is a different test to be used in a jury trial than a trial before a judge alone?

The problem has been dealt with by the European Commission and Court. A pragmatic test without relying on presumptions has been developed.[145] This may have been necessitated by the fact that there are numerous countries with various procedures subject to the Convention. This reasoning is applicable to the Canadian context. In Canada, there are numerous charges, fact situations and criminal justice procedures that necessitate a different view of what is reasonable.

In Huber, the Commission discussed how they would deal with an accused's obstructive behavior and his reliance on procedural rights.

> A preliminary question arises in this context, namely to what extent the applicant's own conduct is at all relevant to the general issue here under consideration. The Commission observes that a distinction must be made between three forms of action in this context:

firstly, the accused person's reliance on procedural rights which are available to him under the law; secondly, his failure to co-operate in the investigation and trial; and thirdly, any deliberate obstruction on his part.

It is generally accepted that an accused person is under no obligation to renounce his procedural rights or to co-operate in the criminal proceedings against him. However, there are two extreme views as to the question of what should be the effect of an unco-operative attitude on the part of an applicant with regard to his claim that the proceedings against him have lasted beyond a reasonable time. In one view such attitude is considered as constituting part of his right as a defendant with the consequence that his conduct is irrelevant with regard to his subsequent allegation that Article 6(1) has been violated by reason of the length of these proceedings. According to the other view, his failure to co-operate and, even more so, any deliberate action on his part to obstruct the proceedings against him, would as a matter of equity have to be regarded as stopping the applicant from complaining under Article 6(1) of the Convention that the proceedings have been delayed beyond a reasonable time.

In the Commission's opinion, neither of these extreme views is convincing. The Commission considers that any unco-operative or even obstructive attitude on the part of the applicant during the proceedings against him, although it cannot defeat his claim under Article 6(1) of the Convention, must nevertheless be taken into consideration in any examination of the question whether or not there has been a violation of his right to a hearing within a reasonable time as guaranteed by that provision. This follows clearly from the time as guaranteed by that provision.[146]

This is the most sensible of the approaches to the problem. The simple fact that a particular indictable matter includes a preliminary hearing, an arraignment, and jury selection does not mean the Crown must expedite other procedures to fit the matter into a predetermined time frame. It simply means the court must examine the history of the proceedings to determine whether in total, they were proceeded with within a reasonable time. The various proceedings establish the context of what is to be examined. By their very nature, criminal proceedings will take different amounts of time. An accused is not penalized for choosing trial by jury. But by the fact he has chosen a jury trial, he has expanded the parameters of what is reasonable. It simply takes more time than the same matter before a provincial court judge. He must accept that.

This does not mean, of course, that he has waived his right to be tried within a reasonable time. It means that a number of new elements in the trial have now been introduced. But they too are subject to review. These elements may exceed a reasonable time period. It is their collective weight that will fall within the confines or violate the right.

(iii) Assertion of the Right

See section (i) The Role of Demand and Waiver: Do We Need It? under section E. "Has The Right".

(iv) Prejudice to the Accused

The most contentious of all the elements, "prejudice" to the accused, seems, at first glance, to be a most proper and fair consideration. The right's basic goal, along with alleviating the anxiety facing the accused, is to prevent impairment or prejudice to the accused's defence. But the real problem here is that prejudice is virtually impossible to show. As Brennan, J., pointed out in Dickey, "what has been forgotten can rarely be shown".[147] There are now advocates suggesting actual prejudice must be shown to have protection under the right. But who can speculate what a faded memory might remember or what a dead witness might have said, or what effect a lost piece of evidence might have had on the minds of a judge and jury? How is the accused to prove this? Is he to swear to it in an affidavit pursuant to his application? And if so, is the Crown bound by what may be an incredible explanation as to the dissappearance of exculpatory witnesses and evidence? Or is the Crown entitled to cross-examine the accused on his affidavit? Does this then not get into a trial on the merits of the case, with the defence submitting its explanations and defences? If this is the method to be used, is the accused not compelled to testify whenever he wishes to exercise his constitutional right? There is a more reasonable approach to this problem which avoids the above-mentioned problems.

To overcome the various problems outlined above, prejudice should be presumed to increase as time goes by. This is not to advocate time as a "triggering mechanism", which generally means that after a certain passage of time, the right is triggered and relief follows. What ought to be the procedure in determining "prejudice" starts with the general premise that memories fade over time. A person is "prejudiced" by a two month delay between the commission of an offence and trial, but usually very little. A four month delay prejudices more and a six month even more. It is just another factor to be weighed in the balance. The problem with ascribing any certain or predetermined weight to it is that the circumstances vary, even in the same set of offences. A delay of one year in respect to a common assault, with the only witness a police officer is not likely to prejudice the accused. However, if he has five witnesses who swear they were with him part of the day and saw him only minutes before the offence, a delay of one year could be critical. It is therefore submitted that the court should review delay as an increasingly prejudicial factor, and not to ignore it simply because prejudice cannot be proven. The lack of proven prejudice should never weigh against the accused. By our common experience, we know delay impairs memories, and prejudices both Crown and defence.

(v) Other Factors Considered in the Balance

One of the most mentioned factors raised is the seriousness of the offence. It has two meanings. The first is that the complexity of the offence allows for greater delay. The complicated conspiracy usually requires more time in preparation and in trial than does the theft over $200. Secondly, this factor implies that for a serious crime, the delay must be longer, the reasons for the delay poorer, an assertion by the accused of the right and some prejudice must be shown.

The major United States decisions refer to the first meaning, and allow for more delay in complicated cases. The European Convention cases also refer to this meaning. It is only in Canada that courts are placing the heavy reliance on the second meaning. Canadian courts are extremely hesitant to dismiss serious charges against an accused in the face of unreasonable delay.

This meaning is naturally considered by the court. A judge is as concerned as a victim with the release of a murderer or rapist on the grounds of delay. But if the delay is so unreasonable, what can the court do but stay the charges? The problem is much easier to prevent than to cure. It is suggested that all courts begin by priorizing offences and begin to give serious crimes the earliest trial dates. They should also set trial dates earlier for older offences and probably set more serious criminal trials ahead of civil cases. Again, the potential prejudice and the effects on the individual's liberty should prevail over monetary issues. Society's interests are better protected by protecting individual's rights and punishing criminals than they are with settling civil claims.

While there is a reluctance to dismiss serious charges on the basis of delay, as the consequence may well be to let an offender back to offend again, it must not be the most important issue. It must be remembered that just as society may be increasingly prejudiced by a possible serious criminal offender being set free, the accused faces a similar increasingly prejudicial situation. That is, while judges may be very reluctant to dismiss serious charges against an accused until extreme delay is shown, judges must not forget that the longer the delay, the more the accused can be prejudiced. It is the serious offender who needs this protection the most, as the consequences of conviction are more severe. The prejudice to a rapist or murderer in delay is far greater than it is to the impaired driver because of the consequences of conviction. The impaired driver may be convicted because his witnesses have forgotten the event, and lose his license. The rapist may be convicted because his witnesses have forgotten the event and lose ten years of his life. To conclude on this point, while the seriousness of the offence should be considered in the balance, it must always be calculated both for and against the state, as well as the accused.

Another factor worth consideration is other available remedies to the complainant. While there is no dispute that any crime is against the state, rather than the individual victim, compensation is a new and proper remedy for the criminal courts to consider. Criminal courts in Canada do take compensation into consideration in sentencing and may order restitution under the Criminal Code. If courts are considering the seriousness of the offence in determining what is "reasonable", the availability of civil remedies should be considered. The victim's condition is important, and can often be improved, if not put back to the same position as it was before the offence. Restitution is a form of mitigation in criminal courts; it should continue to be viewed as such under the "seriousness" issue.

H. Issues Affecting s.11(b): Retroactivity

The question of whether this right covers delays before the Charter came into effect is still being debated. The pre-Charter jurisprudence offers little assistance, with one exception, to be discussed below. The European Convention jurisprudence has dealt with this issue on occasions, and offers some assistance.

There are three schools of thought on the subject of whether pre-Charter delay can be considered in determining whether one was tried within a reasonable time. The first school holds that it is not relevant. This school of thought has numerous rationale behind it. The first is simply that s.11(b) is a new right, and there is nothing in the Charter to suggest it is retroactive.[148] Another is that it is a "substantive" new right, and interpretation doctrines suggest substantive new rights are not to be applied retroactively. This rationale has little judicial support.[149] Another reason for holding against retroactive application is that one cannot impose "standards of conduct" retroactively.[150] The final reason, contrary to R. v. Belton, is that the right is procedural and therefore not retroactive.[151]

The second school holds that the right is retroactive. This interpretation is supported by the higher courts. Again, there are numerous rationale for this interpretation. The first is that the right has existed before the Charter, albeit in a different form. The power to dismiss charges on the basis of laches, prosecutorial neglect, and abuse of process are all components of the larger right to be tried with a reasonable time.[152] Another reason for giving a retroactive interpretation to the right is that it is "procedural" in nature rather than "substantive", with procedural rights being retrospective.[153]

There are finally, numerous rationale that cannot be placed into any one category. One is that while the right is a new "substantive" one, it affects the reasonableness of the post-Charter delay and must be considered, although not as heavily.[154] Another is that while it is a new substantive right, pre-Charter delay must be considered when looking at the "prejudice to the accused" factor. It is clear from the case that held this however, that pre-Charter delay is insufficient to trigger the reasonable time clock and constitute a violation of the right itself.[155] The complaint must have some post-Charter delay to base itself on. Finally, there are cases which simply refer to pre-Charter delay without explaining any rationale.[156]

The third and final major school of thought suggests that the question of retrospective application is not in issue. Rothman, J.S.C., in Daigle outlines this interpretation.

> With respect, I do not believe that the issue is whether the Charter is to be given a retrospective or retroactive effect. The trial of the accused is now. Since the accused is being tried now and since he now has the right under the Charter to a trial within a reasonable time, then surely the Court has a duty, once the issue is raised, to consider the quality of reasonableness of a trial at this time and whether it meets the requirements of s.11(b).
>
> At best, any argument in justification of the delays that occurred prior to the coming into force of the Charter would go merely to the Court's appreciation of the "reasonableness" of those delays. It does not deprive an accused of his right to invoke s.11(b).
>
> Although the right to a trial within a reasonable time may be a new right created under the Charter, this does not mean that, in assessing whether or not that right has been infringed, the Court cannot examine the time elapsed prior to the Charter.
>
> The Crown has no vested right in unreasonable delays.
>
> Prior to the Charter, the Crown may not have had the same constitutional obligation that it now has under s.11(b). But that only goes to the question of reasonableness and it is only one element to be taken into account when deciding whether the delays have been reasonable. It does not affect the existence of the right of an accused to a trial that meets

> the requirements of s.11(b), nor the duty of the Court to consider whether that right has been infringed.[157]

The Ontario Court of Appeal has also accepted this position in R. v. Antoine.[158] The court accepts the position that the right to be tried within a reasonable time is a principle which has been recognized for centuries in England and adopted in Canada. From the review of the pre-Charter Canadian case law, this is evident.[159] The court does accept the distinction that pre-Charter delay is to be treated differently than post-Charter delay,[160] as enunciated by MacDonald, J., in Cameron.

The court cites with approval Minister of Home Affairs et al. v. Fisher et al.,[161] where the Judicial Committee of the Privy Council held that constitutional documents are to receive a large and liberal interpretation.[162]

The court then concluded with the following:

> Patently, s.24 can be invoked only where a right guaranteed by the Charter is alleged to have been infringed, and I accept, of course, that there cannot be a breach of a new right conferred by the Charter prior to the creation of the right. For example, s.10(b) of the Charter provides that everyone has the right on arrest "to retain and instruct counsel without delay and to be informed

of that right". The words which I have italicized confer a new right. That right could not be contravened prior to the coming into force of the Charter because the right did not exist: ... Where, however, there has been a breach of a right secured by the Charter it would be illogical to hold that the remedy provided by s.24 for Charter contraventions does not apply merely because the proceeding in which the Charter right was contravened was initiated prior to the coming into force of the Charter, where the contravention occurred after the Charter came into effect. Mr. Rosenberg argued that it would be anomalous where there has been a contravention of a Charter right, if a defendant who had been charged one day after the Charter came into force could invoke the remedy provided by s.24, but a defendant whose Charter right had been similarly infringed could not invoke the provisions of s.24 because the proceedings against him were instituted one day before the Charter came into effect. I agree. The provisions of the Charter must be read together and when they are so read it is, in my view, clear that the remedy provided by s.24 is intended to be applicable to contraventions of rights secured by the Charter which take place in a proceeding being carried on after the Charter even though that proceeding was instituted before the Charter. I do not think that such an interpretation of the Charter does violence to any constitutional principle, or, indeed, any principle of statutory interpretation.

We were referred by counsel to the following passage in 16 C.J.S. at pp. 121-22:

> There is no presumption that a constitution was intended to be retroactive, and whoever aserts the affirmative has the burden that it has such effect. In fact constitutional provisions, like statutes, always operate

> prospectively, and not retrospectively, unless the words used or the objects to be accomplished clearly indicate that a retrospective operation was intended. However, it has been held that a constitutional provision which does not establish or affect substantive rights, but deals only with remedies is to be construed as operating retroactively.[163]

These decisions are based on the reasoning that as the right to be tried within a reasonable time exists now, the remedy under s.24 must be applicable to any contravention of it, even though the proceedings began before the Charter came into existence.

The retroactivity question has been dealt with in the United States, but in a different context. There, the Court held that the court decision making the right to a speedy trial applicable to the various states, as well as the federal government, would be accorded retroactive application.[164] One case held that where there was a 14 month delay in bringing the defendant to trial, his right to a speedy trial was violated. Another held that the above decision would be given retroactive effect in the situation where the delay in bringing the defendant to trial commenced before the date of the first decision, which required the dismissal of the indictment against the defendant.[165] However, a Florida Appeal Court decision held no retroactivity in the case where the State Supreme Court had held a diligent effort must be made to obtain a defendant from another sovereign and give him a speedy trial.[166] While not directly on point, the majority of the cases hold that U.S. Supreme Court decisions on the right to a speedy trial are retroactive.

The European Convention decisions are helpful in that contracting states have only recently ratified the Convention, raising the issue of pre-ratification delay. The issue was raised in Ventura v. Italy,[167] with the Commission holding the following:

> At the hearing of the parties before the Commission, the respondent Government stated that, in order to assess the reasonableness of the period referred to in Article 5(3), the Commission must take into account only the period subsequent to 1 August 1973. Italy has in fact recognized the Commission's jurisdiction in respect of individual applications only to the extent that these relate to acts, decisions, facts or events subsequent to 31 July 1973.
>
> The Commission recalls that, according to its decisional case-law, it does not have jurisdiction in respect of events occuring prior to the effective date of the declaration whereby the respondent State recognises the Commission's competence to receive applications lodged in accordance with Article 25 of the Convention ... However, in examining the length of the detention undergone subsequent to that date, the Commission takes account of the stage

> which the proceedings had reached. To that extent, therefore, it has regard to the previous detention.[168]

The Commission, therefore, apears to be taking the same stance as Cameron and Balderston. That is, it appears that the pre-ratification delay is examined when considering the post-ratification proceedings. While the interpretation is of Article 5(3) (the Article applying to delay when one is being detained) rather than Article 6(1) (the Article applying to delay in proceedings respecting civil rights and obligations and criminal charges), the distinction is not important. The rationale is not affected by this difference, nor is there any reason it should be.

The school of thought advocating no retrospective application of the right is ill-founded. The rationale given by de Weerdt, J., in Panarctic Oils Ltd., stating that the right is a substantive new right and cannot be given retrospective effect is erroneous. Most of the elements of the right have existed in both England and Canada for years. Prosecutorial laches, abuse of process, and the very power to refuse adjournments are elements of a larger and more encompassing right to be tried within a reasonable time. This view is supported by Antoine. Indeed, if there is a new element to the right, it is that pre-charge delay is to be considered. Inconsistently, de Weerdt, J., expressly rejects this notion.

As suggested earlier, pre-charge delay ought to be considered when the situation of the person concerned has been affected as a result of the suspicion against him. This clearly adds a new element to the right to be tried within a reasonable time. However, the debate whether the addition of this new element is a substantive or procedural addition need not be entered into.

The rationale enunciated in Antoine is superior to that of the others. In Antoine, the court noted that constitutional documents are to be given a broad and liberal interpretation. If the evils which the right combats are reviewed, it is clear they all exist before and after the Charter's proclamation. There is no public policy argument in denying the pre-Charter complaint.

Further, the right, whether it is a new substantive right or a procedural one, crystalized on the Charter proclamation. Its constitutionalized form guarantees a right, which if infringed, may activate a remedy under s.24(1). This remedy is available for contraventions of rights secured under the Charter which take place in proceedings being carried on after the Charter's proclamation, even though the proceeding was instituted before the Charter. The right exists now. As the Ontario

Court of Appeal points out, it would be illogical to hold that where a breach of a right secured by the Charter, the remedy does not apply merely because the proceedings in which the Charter's right was contravened was instituted prior to the coming into force of the Charter, where the contravention of the right occured after the Charter came into effect.

FOOTNOTES

1 Special Joint Committee On The Constitution Of Canada Proceedings 1980-81, 47:30-31, found in 32nd PARL.SESS. 1; Nos. 44-57

2 Ibid, 47:31

3 Re PPG Industries Canada Ltd. and A.G. of Canada (1983) 3 C.C.C. 97 (B.C.C.A.)

4 11. Any person charged with an offence has the right

> (f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;

5 PPG, Supra, fn 2, 107 (leave to appeal to the Supreme Court of Canada granted, March 21, 1983) However, see Nemetz, C.J.B.C., where he notes that the term used in s.11 is "any person" rather than "everyone". At p. 103, he asks "Why did the draftsmen change from using the word 'everyone' to the words 'any person'?" He concludes that it was intended to restrict the right. Reviewing the statement made by Jean Chretien (fn 2) however, it is clear Nemetz is incorrect.

6 R. v. Big M. Drug Mart Ltd. (1984) 9 C.C.C. 310 (Alta. C.A.)

7 Leave to appeal to the Supreme Court of Canada granted December 19, 1983

8 R. v. Panarctic Oils Ltd. (1982) 38 A.R. 447 (N.W.T.S.C.)

9 Ibid, 457

10 Re Balderstone and The Queen et al. (1983) 3 C.R.R. 174 (Man. Q.B.); affg. (1984) 6 C.R.R. 356 (Man. C.A.) (leave to appeal to the Supreme Court of Canada dismissed December 12, 1983)

11 Union Colliery Co. v. R. (1900) 31 S.C.R. 81 at 88

12 Southam Inc. v. Hunter et al. (1983) 3 C.C.C. 497 (Alta. C.A.); affg., unreported, S.C.C.

13 Century Helicopters Inc. et al. v. Her Majesty The Queen and Corporal Thorton, unreported, 27 September 1983, J.D. of Edmonton, Q.B. 8303 23668 (Alta. Q.B.) See also R. v. Bank of Nova Scotia, unreported, 22 December 1983, J.D. of Regina, (Sask. Prov. Ct.), [1983] Sask. D. 5980-01, where the court appears to accept the proposition that corporations have standing to argue a violation of s.11(b). In this case, the court held the bank had sought the delay.

14 Union Colliery Co. v. The Queen (1900) 31 S.C.R. 81 at 89

15 Dictionaire Juridique Francais-Anglais (6th Ed.)

16 For a list of cases holding both propositions, see 16A C.J.S. Constitutional Law Section 573

17 Id.

18 See Infra, fns 24 to 28

19 R. v. Antoine (1983) 4 C.R.R. 126 (Ont. C.A.)

20 Ibid, 136

21 R. v. Boron (1983) 36 C.R. (3d) 329 (Ont. H.C.)

22 Ibid, 335

23 Ibid, 334

24 R. v. Barkey (1983) 1 C.C.C. (3d) 430 (Ont. G.S.P.), R. v. Petahtegoose (1982) 8 W.C.B. 362 (Ont. Prov. Ct.), R. v. Mills (1983) 3 C.R.R. 62 (Ont. H.C.); affg. (1984) 6 C.R.R. 88 (Ont. C.A.)

25 Antoine, Supra, fn 19, Mills, Ibid

26 Re Primeau and The Queen (1983) 1 C.C.C. (3d) 207 (Sask. Q.B.). But note, the date the information was sworn was only days after the alledged offence occured.

27 R. v. Bertsch et al., unreported, 15 October 1982, J.D. of Drumheller, (Alta. Prov. Ct.), [1983] Alta. D. 5980-03

28 *R.* v. *Panarctic Oils Limited* (1982) 38 A.R. 447 (N.W.T.S.C.) But note, the court rules that this date is only applicable if the charges were laid after the Charter came into effect. If before, the court believes the operative date is the date the Charter came into force.

29 *R.* v. *Mingo et al*. (No. 2) (1983) 4 C.R.R. 18 (B.C.S.C.) and *R.* v. *Belcourt* (1983) 69 C.C.C. (2d) 286 (B.C.S.C.).

30 *R.* v. *Belcourt* (1983) 69 C.C.C. (2d) 286 at 287 (B.C.S.C.)

31 *Ibid*, 288

32 D. H. Doherty, "Boron: Is Pre-Charge Delay Relevant in Determining Whether s.11(b) Has Been Infringed?" (1984) 36 C.R. (3d) 338 at 339

33 *R.* v. *Forsberg* (1983) 2 C.R.R. 60 (B.C. Prov. Ct.)

34 *R.* v. *Biggar* (1983) 1 C.C.C. (3d) 23 at 29 (Man. Prov. Ct.) Note however, the court neither expressly rejects or accepts this argument. It states, albeit in dicta, that pre-indictment delay may be considered where it appears there is "an ulterior motice" for the delay.

35 *R.* v. *Dahlem* (1982) 25 Sask. R. 10 at 22 (Sask. Q.B.)

36 *R.* v. *H.W. Corkum Construction Ltd.* (1983) 5 C.C.C. (3d) 575 (N.S.S.C.A.D.), which upheld a trial judge's ruling that pre-charge delay was to be considered in determining "reasonableness"

37 *R.* v. *Daigle* (1982) 32 C.R. (3d) 388 (Que. Sup. Ct.), upholding a lower court's decision to consider both pre-charge and pre-Charter delay on the issue of reasonableness, and *R.* v. *Boire et al*. (1983) 36 C.R. (3d) 364 (Que. Sup. Ct.), where the court held that a 3 1/2 year pre-charge delay, along with a 2 1/2 year post-charge delay was unreasonable.

38 *R.* v. *Milley* (1983) 43 Nfld. and P.E.I.R. 86 (Nfld. S.C.T.D.), where the court indicated that the delay between the commission of the offence and the time of trial "is pertinent in determining whether a delay occuring after the time that the accused is charged is reasonable..." (p. 88, para. 18)

39 Re Regina & Carter (1983) 9 C.C.C. (3d) 173 (B.C.S.C.), where the court held that pre-information delay may be considered under s.11(b) where there has been a post-information delay which "may well be of significance on a consideration of the prejudicial effect of post-information delay". (p. 187) The court rejected the argument that "Any person charged" defines a class of people entitled to the right. It did however, state that pre-information delay could affect s.7, the "fundamental principles of justice" clause, much the same way American courts have interpreted the "due-process" clause. However, see A.G. of B.C. v. Craig Prov. J. & Carter (1983) 36 C.R. (3d) 346 (B.C.S.C.), where the court appears to support the proposition that the earliest date one can be considered "charged" is when the information is sworn. The court specifically rejects the argument that "any person charged" simply outlines the class of persons entitled to that protection.

40 R. v. Cameron (1982) 29 C.R. (3d) 73, (Alta. Q.B.); affg. (1983) 31 C.R. (3d) 287 (Alta. C.A.), and Re Regina and Beason (1984) 7 C.R.R. 65 (Ont. C.A.)

41 R. v. Chabot [1980] 2 S.C.R. 985 at 1005, citing with approval from United States v. Patterson, 150 U.S.R. 65 (1893)

42 Dickey v. Florida, 398 U.S. 30 (1969)

43 United States v. Ewell, 383 U.S. 116 (1966)

44 Id.

45 Id.

46 Klopfer v. North Carolina, 386 U.S. 213 (1967)

47 Id.

48 Williams v. United States, 102 U.S. App. D.C. 51, 55, 250 F. 2d 19, 23 (1957)

49 Dickey v. Florida, 398 U.S. 30, 43 (1969)

50 Ibid, 44

51 Escobedo v. Illinois, 378 U.S. 478, 490 (1964)

52 Dickey, Supra, fn 42, 46

53 Id.

54 Id.

55 United States v. Marion et al., 404 U.S. 307 (1971)

56 Ibid, 313

57 Id.

58 Ibid, 328

59 Id.

60 Ibid, 329

61 Id.

62 Ibid, 330

63 Beavers v. Haubert, 198 U.S. 77, 87 (1905)

64 United States v. Marion et al., 404 U.S. 307, 332 (1971)

For further support of this proposition and examples where pre-indictment delays are more harmful than post-indictment delays, see 20 Stan. L. Rev, 476, 489

65 Miranda v. Arizona, 384 U.S. 436 (1966)

66 In Miranda, the right to counsel was violated, and the Court was unconcerned whether an "arrest" or "indictment" was necessary for a person to be an "accused".

67 Hoffa v. United States, 385 U.S. 293 (1966)

68 United States v. Lovasco, 431 U.S. 783, 97 S.Ct. 2044, 52 L.Ed. 2d 752 (1977)

69 United States v. MacDonald, 102 S.Ct. 1497 (1982)

70 Ibid, 1510

71 Ibid, 1504

72 Ibid, 1505

73 Id.

74 Klopfer v. North Carolina, 386 U.S. 213 (1967)

75 United States v. MacDonald, 102 S.Ct. 1497, 1506 (1982)

76 Id.

77 Id.

78 Id.

79 Id.

80 Ibid, 1508. The minority states that the majority decision results in this, even though the government may be acting in bad faith. The majority held, however, that in this case they did not. The minority notes the assertion that the government did not act in bad faith is "puzzling", as under their interpretation, good or bad faith is totally irrelevant between successive prosecutions.

81 See Barker v. Wingo, Warden, 407 U.S. 514, 531 (1971)

82 Moore v. Arizona, 414 U.S. 25, 94 S.Ct. 188, 38 L.Ed 183 (1973)

83 Herbert Huber v. Austria [1971] Y.B. EUR. CONV. ON HUMAN RIGHTS 572 (Eur. Commission of Human Rights) (Admissability); [1975] Y.B.EUR. CONV. ON HUMAN RIGHTS 324 (Eur. Committee of Ministers of Human Rights); [1974] Y.B. EUR. CONV. ON HUMAN RIGHTS 314 (Eur. Commission of Human Rights) (Admissability)

84 Fritz Neumeister v. Austria [1964] Y.B. EUR. CONV. ON HUMAN RIGHTS 224 (Eur. Commission of Human Rights) (Admissability); [1968] Y.B. EUR. CONV. ON HUMAN RIGHTS 812 (Eur. Court of Human Rights); (1979-80) 1 E.H.R.R. 91

85 Huber, Y.B. [1975] 324 at 358-360

86 Crociani and others v. Italy [1981] Y.B. EUR. CONV. ON HUMAN RIGHTS 222 (Eur. Commission of Human Rights) (Admissability)

87 Corigliano v. Italy (1983) 5 E.H.R.R. 344

88 *Ibid*, para. 34

89 Mr. E.G. Ewaschuk, Director, Criminal Law Amendments Section with the Department of Justice, in response to questioning from Mr. John Frazer, M.P.; Special Joint Committee on the Constitution of Canada Proceedings 1980-81, 47:37, 32 PARL. SESS 1; Nos. 44-57

90 Special Joint Committee on the Constitution of Canada Proceedings 1980-81, 4:58, 32 PARL. SESS 1; Nos. 1-16

91 *Dickey* v. *Florida*, 398 U.S. 30, 42 (1969)

92 *United States* v. *Ewell et al*., 383 U.S. 116, 120 (1966)

93 *Klopfer* v. *North Carolina*, 386 U.S. 213, 222 (1967)

94 *Smith* v. *Hooey*, 360 U.S. 1 (1958)

95 *Huber*, *Supra*, fn 83

96 *Grant* v. *D.P.P. (Jamaica)* [1981] 3 W.L.R. 352 (P.C.), (1981) 7 Commonwealth Law Bulletin, 1247

97 *Ibid*, 358

98 Mr. E.G. Ewaschuk, Director, Criminal Law Amendments Section, responding to questions posed by the Honourable James McGrath, Special Joint Committee on the Constitution of Canada Proceedings 1980-81, 47:32, 32 PARL SESS. 1; Nos. 44-57

99 *Rights, Freedoms and the Courts*, (A Practical Analysis of the Constitution Act, 1982) (1983)

100 *Ibid*, 362

101 *Ederhard Konig* v. *Federal Republic of Germany*, Application No. 6232/73, Report of the Commission (adopted on 14 December, 1976) Series B, Volume 25

102 It may well have been difficult, if not impossible, to get support for this right from the provinces, who have control over civil matters. No evidence of an attempt to include this phrase, or an explanation as to it's exclusion has been found. We are left with Manning's suggestion that the broader term in the Charter was purposely made to ensure these types of offences would be included.

103 R. v. Pollard (1918) 39 D.L.R. 111 (Alta. S.C.A.D.) See also R. v. Suchacki [1924] 1 D.L.R. 971 (Man. C.A.)

104 R. v. Howard (1972) 18 C.R.N.S. 395 (Ont. C.A.); revg (1972) 6 C.C.C. (2d) 298

105 Ibid, (1972) 18 C.R.N.S. 395 at 397

106 Id.

107 See The Queen v. Dixon (1895) 2 C.C.C. 589 (N.S.C.A.), where the Nova Scotia Court of Appeal held that offence refers to breaches of both provincial and Dominion statutes.

108 As in federal and provincial offences, the administrative tribunal should not be held accountable for pre-charge delay as the result of cleverly concealed conduct. However, where the offence is uncovered, pre-charge delay should logically be considered the same as that "pre-indictment" delay.

109 Re James and Law Society of British Columbia (1983) 4 C.R.R. 293 (B.C.S.C.)

110 Ibid, 295

111 R. v. Mingo et al. (1983) 4 C.R.R. 18 (B.C.S.C.)

112 Ibid, 30

113 Re Feige and Governing Board of Denture Therapists (1984) 150 D.L.R. (3d) 381 (Ont. H.C.)

114 See also Re Donald and Law Society of British Columbia (1984) 7 C.C.C. 305 (B.C.C.A.), where the court held that s.13 of the Charter (the right not to have any incriminating evidence so given used to incriminate him in any other proceedings) extended to any proceedings which expose the person to a criminal charge, penalty or forfeiture.

Anderson, J. A., states at 317 that:

> "The use of the words 'offence', 'verdict of guilt', 'penalties' and 'punishment' serves to reinforce my opinion that the proceedings against the accused are not 'civil' in the sense that

they do not deal with the establishment of civil liability but rather with establishment of guilt in respect of a statutory offence. In other words, "the proceedings are penal in nature with penal consequences."

115 Barker v. Wingo, Warden, Supra, fn 81, in which the Court expressly rejects the so-called "demand-waiver" doctrine.

116 For cases where it has been a deciding factor in rejecting the applicant's claim, see R. v. Leggo (1983) 69 C.C.C. (2d) 443 (Alta. Prov. Ct.), R. v. Boron (1984) 6 C.R.R. 215 (Ont. H.C.), R. v. Kylo, unreported, 6 April 1984, J.D. of Edmonton, Q.B. 8303-1108-C2 (Alta. Q.B.)

117 Barker v. Wingo, Warden, Supra, fn 81

118 Ibid, 521

119 American Bar Association Project on Standards for Criminal Justice, Speedy Trial 14-17 (Approved Draft 1968)

120 Barker v. Wingo, Warden, Supra, fn 81, 528

121 Ibid, 529

122 Ibid, 530

123 United States ex rel Von Csek v. Fay, 313 F 2d 620, 623 (C.A. 2d Cir. 1963)

124 Barker v. Wingo, Supra, fn 81, 536

125 Ibid, 537

126 Ibid, 537-8

127 United States v. Marion et al., 404 U.S. 307 (1971)

128 Ibid, 320

129 Dickey v. Florida, 398 U.S. 30 (1969)

130 Ibid, 49

131 Ibid, 50

132 Id.

133 Barker v. Wingo, Warden, Supra, fn 81, 528

134 Darville v. The Queen (1956) 116 C.C.C. 113 (S.C.C.)

135 Kurt-Heinz Wemhoff v. The Federal Republic of Germany [1964] Y.B. EUR. CONV. ON HUMAN RIGHTS 280 (Eur. Commission of Human Rights) (Admissability); [1968] Y.B. EUR. CONV. ON HUMAN RIGHTS 796 (Eur. Court of Human Rights); (1979-80) 1 E.H.R.R. 55

136 Wemhoff, Y.B. [1968] 796 at 800

137 See Brennan, J., in Dickey, Supra, fn 42, where he states he has found no cases considering delay throughout a trial.

138 Wemhoff, Y.B. [1968] 796 at 808

139 Franz Johannes Mellin v. The Federal Republic of Germany [1973] Y.B. EUR. CONV. ON HUMAN RIGHTS 300, 326 (Eur. Commission of Human Rights) (Admissability)

140 Eckel v. The Federal Republic of Germany (1983) 5 E.H.R.R. 1

141 Ibid, 28-29

142 "Barker v. Wingo: Speedy Trial Gets a Fast Shuffle", 72 Columbia Law Review, (1972) 1276, 1384

143 Id.

144 Barker v. Wingo, Warden, Supra, fn 81, 531

145 Huber, Y.B. [1975] 324 at 376-378

146 Id.

147 Dickey v. Florida, 398 U.S. 30 (1969)

148 Panarctic Oils Ltd. v. The Queen (1983) 2 C.R.R. 358 (N.W.T.S.C.), Re DeMarco (1983) 2 C.R.R. 314 (Ont. Co. Ct.)

149 See R. v. Belton (1983) 3 C.R.R. 335 (Man. C.A.) (leave to appeal to the Supreme Court of Canada dismissed February 1, 1983) which supports this proposition in dicta, but states they need not

decide the issue. This rational received support at the provincial court level in R. v. Mills (1983) 2 C.R.R. 300 (Ont. Prov. Ct.), but this was subsequently reinterpreted by the Ontario Court of Appeal, (1984) 6 C.R.R. 88

150 R. v. Forsberg (1983) 2 C.R.R. 60 (B.C. Prov. Ct.)

151 R. v. Mingo et al. (1983) 4 C.R.R. 18 (B.C.S.C.)

152 Re Regina and Beason (1984) 7 C.R.R. 65 (Ont. C.A.)

153 R. v. Coghlin (1983) 2 C.R.R. 291 (Ont. H.C.)

154 R. v. Cameron (1982) 1 C.R.R. 289 (Alta. Q.B.); affg. (1984) 5 C.R.R. 37 (Alta. C.A.) Also see Re Balderstone and The Queen et al. Play-All Ltd. et al v. Pennes et al (1983) 3 C.R.R. 174 (Man. Q.B.) which cites with approval Cameron

155 R. v. Mills (1983) 3 C.R.R. 63 (Ont. H.C.); affg. (1984) 6 C.R.R. 88 (Ont. C.A.) (leave to appeal to the Supreme Court of Canada granted 20 September, 1983)

156 R. v. Chartrand (1984) 5 C.R.R. 88 (Man. Co. Ct.)

157 R. v. Daigle (1983) 4 C.R.R. 153 at 157 (Que. Sup. Ct.)

158 R. v. Antoine (1983) 4 C.R.R. 126 (Ont. C.A.)

159 The court notes, however, that this right has been "imperfectly protected". Ibid, 132

160 In my view, no retrospectivity issue arises with respect to the application of s.11(b) of the Charter to the present case. The Charter was in force at the time of the respondent's arraignment and consequently the respondent was entitled to invoke the provisions of s.11(b). Manifestly, s.11(b) of the Charter applies only to trials taking place after it came into force, and it does not reach back and affect past trials. An enactment does not, however, operate retrospectively because a part of the requisites for its operation is drawn from a time antecedent to its coming into force, nor because it takes into account past events: see R. v.

Johnson, 34 C.C.C. (2d) 325, 37 C.R.N.S. 244, [1976] 6 W.W.R. 747; affirmed [1978] 2 S.C.R. 391, 39 C.C.C. (2d) 479, 4 C.R. (3d) 269; R. v. Negridge (1980), 54 C.C.C. (2d) 304, 17 C.R. (3d) 14, 6 M.V.R. 255 (Ont. C.A.). Accordingly, where a person being tried after April 17, 1982, invokes s.11(b), the court in deciding whether the right secured by the Charter has been infringed may take into account delay antecedent to the Charter coming into effect; although delay antecedent to the Charter does not have the same weight as delay subsequent to the Charter: See R. v. Cameron (1983), 1 C.R.R. 289, 70 C.C.C. (2d) 532, 29 C.R. (3d) 73 [appeal dismissed for want of jurisdiction 31 C.R. (3d) 287, [1983] 2 W.W.R. 671]; R. v. Daigle (an unreported decision of Mr. Justice Rothman of the Quebec Superior Court dated November 29, 1982 [since reported 32 C.R. (3d) 388]). Antoine, Supra, fn 158, 132-133

161 Minister of Home Affairs et al. v. Fisher et al. [1980] A.C. 319

162 I do not consider, however, that the inflexible rule enunciated in those cases that a new jurisdiction conferring or enlarging a right of appeal applies only to proceedings commenced after the new jurisdiction was conferred, is applicable to the remedy provided by s.24 of the Charter for a breach of a right constitutionally secured by the Charter. The remedy under s.24(1) by its terms is available to anyone whose rights or freedoms, as guaranteed by the Charter, have been infringed. Moreover, the provisions of s.24(1) should be given a large and liberal interpretation so as to give full recognition and effect to the rights and freedoms guaranteed by s.1 of the Charter. In Minister of Home Affairs et al. v. Fisher et al., [1980] A.C. 319, which involved the interpretation of a provision in s.11(5) of the Constitution of Bermuda, Lord Wilberforce, speaking for the Judicial Committee of the Privy Council, said at p. 329:

> A Constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to the language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the charter and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental ... freedoms with a statement of which the Constitution commences.

163 Antoine, Supra, fn 158, 134-5

164 Lassiter v. Turner, C.A.N.C. 1970, 423 F. 2d 897, certiorari denied 91 S. Ct. 47, 400 U.S. 852, 27 L. Ed. 90

165 Rutherford v. State, Alaska 1971, 486 P 2d 946

166 Hoskins v. State, Fla. 1969, 221 So. 2d 447, certiorari dismissed 90 S. Ct. 196, 396 U.S. 897, 24 L. Ed. 2d 175

167 Gioranni Ventura v. Italy [1979] Y.B. EUR. CONV. ON HUMAN RIGHTS 148 (Eur. Commission of Human Rights) (Admissability); [1981] Y.B. EUR. CONV. ON HUMAN RIGHTS 472 (Eur. Committee of Ministers of Human Rights)

168 Ventura, Y.B. [1979] 148 at 152-154

CHAPTER IV

SUMMARY

In summary, an attempt has been made to develop a rational series of tests and definitions with respect to the right to be tried within a reasonable time. This has been done by analyzing the goals and objectives of this right. While some assistance was derived from the Joint Senate and the House of Commons Committee hearings, the evils guarded against have been enunciated in American jurisprudence. In summary, the following interpretations have been advocated:

1. "any person" should include both natural persons as well as corporate and unincorporated bodies;

2. "charged", or the date one is entitled to the rights protection, should begin when the person concerned has been affected as a result of the suspicion against him;

3. "with an offence" should include all federal and provincial offences, as well as any administrative board or tribunal, empowered to determine whether one's conduct amounts to conduct deserving sanction, and with it the power to levy sanctions, either by monetary penalty of affecting privileges or rights, should be subject to s.11(b);

4. "has the right" should be interpreted so as not to demand of the complainant a positive duty to affirm the right. All delays attributable to the accused should not be considered in the reasonable time calculation. The party seeking the adjournment should have that delay weighed against them. Delays caused by other state organs should weigh in the accused's favor. Only where the Crown or accused are "taken by surprise" should their delay not weigh against them. Finally, both the courts and defence counsel should always inform the accused of their right to be tried within a reasonable time;

5. "to be tried" should be interpreted to mean final judgment, whether it be by appeal or not. The appeal route is simply an objective fact which defines the fact situation in interpreting reasonableness; and

6. "within a reasonable time" should always be interpreted according to the specific fact situation. The actual time frame should be established by examining the Canadian

pre-Charter jurisprudence. In interpreting what is "reasonable", the actual length of delay must obviously be examined. There should exist no time period which "triggers a presumption of delay". All delays should simply be viewed to determine whether they are reasonable. If they are not, the next question is whether they deserve the protection offered by s.24(1). Presumptions of law do not protect those in unusual situations.

The reasons for the delay must then be examined. All delays attributable to one side or the other should be calculated against the side sponsoring the delay. The only valid "neutral" reasons are those which the state has no control over. However, if they accumulate, they too may lose their "neutral colour." Assertion of the right should not be considered in the balance. Prejudice, because of the virtual impossibility of proving it, should not be required to be proven. Rather, prejudice should be assumed to grow as the delay grows longer. By the common experience of man, we know increasing delay impairs memories and creates greater prejudice. Prejudicial value can almost never be weighed accurately.

As discussed, courts are generally reluctant to dismiss serious offences. The seriousness of the offence, however, should also be viewed from the accused's perspective. The serious penalty possibly suffered by the accused as a result of the normal prejudice resulting from delay is to be protected against. Finally, other remedies, such as civil remedies and restitution orders available to the victim, should be considered.

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APPENDIX A

CANADIAN PRE-CHARTER JURISPRUDENCE ON ABUSE OF PROCESS AS IT RELATES TO DELAY

CASE NAME	CHARGE	PRE-CHARGE DELAY	REASONS FOR	POST-CHARGE DELAY	REASONS FOR	REMEDY SOUGHT	RESULT	REASON
R. v. *Gotfried*	selling short weighted goods	3 months	illness of Crown witness	7 1/2 months	written sub-missions	quashing of indict-ment	granted	3 month delay impaired right to full answer and defence, information void due to uncertainty
R. v. *Botting*	not given			5 ad-journ-ments	not given	certiorary quashing committal	denied	not given
R. v. *Advance T.V. and Car Radio Centre*	false advertis-ing	4 months 11 days	not given			quashing committal	denied	better particu-lars could remedy situation
R. v. *McClevis*	obstruc-tion, liquor offences and 3 others			2 years 3 months		quashing committal and prohib-ition	quashed but no prohib-ition	loss of juris-diction, but presumptious and insulting to other courts to issue pro-hibition now
R. v. *Osborn*	attempted forgery			1 year 2 months	relaid charges after acquital to con-spiracy to commit forgery	stay of pro-ceedings	denied	3 justices said no power in courts, 3 others said there was, but here there was no oppression

CASE NAME	CHARGE	PRE-CHARGE DELAY	REASONS FOR	POST-CHARGE DELAY	REASONS FOR	REMEDY SOUGHT	RESULT	REASON
R. v. Ittoshat	creating a disturbance			10 days	Crown requested adjournment	deny adjournment, dismiss charges and motion to stay proceedings	granted	Inuit accused 1,000 miles from home, oppressive to grant adjournment
R. v. Chapman & Currie	not given			1 1/2 years	lengthy but successful proceeding by co-accused to quash commital	an order compelling the A.G. to prefer an indictment or that the matter be dismissed for want of prosecution	denied	A.G. has authority not to prefer the indictment
R. v. Trend-setter	false advertising			1 1/2 years	first charge quashed, lack of diligence by Crown	quashing of of information before plea	granted	delay impaired the defense
R. v. Kowerchuk	trafficking			5 months	withdrawal of charge and relaying a different one	certiorari to quash order to stay proceedings (Crown Appeal)	denied	no abuse of process on the facts

CASE NAME	CHARGE	PRE-CHARGE DELAY	REASONS FOR	POST-CHARGE DELAY	REASONS FOR	REMEDY SOUGHT	RESULT	REASON
R. v. Koski	juvenile delinquencies			13 months	Crown adjournments and attempts to waive matter into adult court	application under s.37 Juvenile Delinquents Act for special leave to appeal	granted	accused had been ready to proceed both times, numerous defense witnesses, embarrassment and anxiety
A.G. Sask v. McDougall	impaired driving			9 months	Crown adments, acquittal and application for trial de novo	Crown appeal seeks trial de novo	denied	long delay, anxiety of accused and faded memories
Re Regina & Carpenter	trafficking			2 years	1 mistrial and 1 hung jury	Crown seeks mandamous requiring court to hear the matter	granted	not abusive, simply original indictment not concluded
R. v. Myles (No. 2)	uttering threats			greater than 6 months	crowded dockets, attempting to find an impartial judge, lost jurisdiction and relaying of charges	quash information before plea	denied	no "mala fides" shown on behalf of the Crown

CASE NAME	CHARGE	PRE-CHARGE DELAY	REASONS FOR	POST-CHARGE DELAY	REASONS FOR	REMEDY SOUGHT	RESULT	REASON
R. v. Muttner	Weights and Meaures Act	5 months 4 days	not given			Crown appeals dismissal of the informations	allowed (new trial ordered)	within the 6 month time period
Re Regina & Attwood	break and enter, possession of stolen goods			3 months	Crown staying and relaying to circumvent peremptory trial date order	Crown seeks certiorari quashing order quashing informations	granted	even though Crown behaviour reprehensible and dangerous, it's within their power
R. v. Thorpe	indecent assault			2 1/2 years	5 of 6 adjournments by the Crown	stay of indictment	granted	inordinate delay, loss of witnesses' memory, even though serious offence
R. v. McAnish & Cook	not given			not given	Crown entered stay and relays to avoid peremptory trial date	stay of proceedings before plea	granted	failure to stay would render court's power to deny adjournments nugatory

CASE NAME	CHARGE	PRE-CHARGE DELAY	REASONS FOR	POST-CHARGE DELAY	REASONS FOR	REMEDY SOUGHT	RESULT	REASON
R. v. Del Puppo	possession of stolen vehicle			9 months remanded "many times"	Crown not ready, enters stay and relays to avoid peremptory trial date	stay of proceedings before plea	granted	Crown lead accused to believe matter was resolved, long delay coupled with fact charges proceeded with only after Crown learned accused entitled to parole
Re Vroom & Lacey and The Queen	possession for the purpose of trafficking			11 months	Crown relaying because of defects	prohibition	denied	despite delay not attributable to accused he knew what he was charged with. No abuse
R. v. Barnett	rape					mandamus to stay proceedings, application was to direct trial judge to rule on the "stay" applications	granted	court has power to prevent abuses of process at preliminary

CASE NAME	CHARGE	PRE-CHARGE DELAY	REASONS FOR	POST-CHARGE DELAY	REASONS FOR	REMEDY SOUGHT	RESULT	REASON
Doyle v. The Queen	fraud and breach of trust	8 months	not given			mandamous declaring recognizance void	granted	a delay of 8 months between arrest and opportuntity to elect for trial causes loss of jurisdiction
R. v. Heric	impaired driving			not given	Crown relayed after failing to obtain adjournment	quash information before plea	granted	it would be an affront to the judge who denied the adjournment
R. v. Martens	unlawful assembly			continuing	lack of court facilities meant a long trial had to be heard on numerous Mondays	Crown appeal seeks reversal of refusal to grant Crown adjournment	refused	facilities totally inadequate, possible prejudice to accuseds
R. v. Burns, Fairchild and Donnelly	possession for the purpose of trafficking			3 years 2 months	lack of court facilities, addition of an importing charge 2 3/4 years later	stay of proceedings before election	refused in part	no prejudice on original charges, but new charge of importing stayed as oppressive

CASE NAME	CHARGE	PRE-CHARGE DELAY	REASONS FOR	POST-CHARGE DELAY	REASONS FOR	REMEDY SOUGHT	RESULT	REASON
R. v. Betesh	assault	agreement not to charge as a result of the strike settlement				stay	granted	provincial Crown wished to prosecute though federal Crown agreed not to, both Crowns indivisable in the eye of the court
R. v. Falls and Nobes	rape			over 1 year	complainant did not appear Crown withdrawal complainant relays. 10 adjournments, only one by the accused	stay	granted	conduct of complainant and crowded courts, delay impairs memories, affect on accused's salutory
R. v. Locke	statutory rape	3 1/2 months	delay between reading of charges and election			application to quash information	denied	by rigidly following dicta in Doyle, the courts could deny full answer and defence

CASE NAME	CHARGE	PRE-CHARGE DELAY	REASONS FOR	POST-CHARGE DELAY	REASONS FOR	REMEDY SOUGHT	RESULT	REASON
R. v. Buckley et al.	drug offences			1 year, 12 adjournments	crowded courts	application to stay indictment	granted	duty on state to provide facilities, delay too long with too many adjournments
R. v. Velvick	unknown			stayed charges recommenced	court was leaning towards denying Crown adment request	stay	denied	no oppression or impairment of defence and A.G.'s power uninhibited
R. v. Forrester	trafficking	7 1/2 months	unknown	over 6 months	Crown not prepared, granted adjournment	prohibition with certiorari in aid	denied	defence subsequently abused the proceeding with 12 adjournments over 8 months
Ex Parte Cordes	trafficking			3 1/2 months	unknown, accused in custody	habeas corpus with certiorari in aid	denied	court was satisfied matter could be brought to trial within a reasonable time

CASE NAME	CHARGE	PRE-CHARGE DELAY	REASONS FOR	POST-CHARGE DELAY	REASONS FOR	REMEDY SOUGHT	RESULT	REASON
R. v. Scheller (No. 1)	theft			10 months	relaying charges after adjournment refused with Crown calling no evidence	stay or dismiss	stay granted	an affront to the court, Crown should have appealed refusal to adjourn
R. v. Catagas	Migratory Birds Convention Act s.6					Crown seeking quashing of stay	granted	lower courts have no power to stay
R. v. Davis	tax evasion			9 years	court refusing to allow Crown freedom to try last counts first and apply similar fact evidence	appeal of order dismissing application for prohibition	denied	Crown wishing to expedite matters, judge responsible for delay
Rourke v. The Queen	kidnapping and robbery	20 months	failure of police to search for accused			quashing a mandamus order	denied	despite possible prejudice, no power to stop regularly instituted proceedings

CASE NAME	CHARGE	PRE-CHARGE DELAY	REASONS FOR	POST-CHARGE DELAY	REASONS FOR	REMEDY SOUGHT	RESULT	REASON
R. v. Glass (No. 1)	stock exchange fraud	20 months	accused out of the country	3 months and 12 adjournments, with 2 more months expected	complex case (406 charges) accused appearing every 7 days, shortage of courts	quashing informations for want of prosecution	denied	compared to the jurisdiction, not unreasonable for a 3 to 4 month delay, however, stated they'd hear the applicant again if matters did not proceed expeditiously
Tasek v. R. in Right of B.C. et al.	break and enter and theft			unknown	stay to avoid refusal to adjourn	prohibition	granted with costs to accused	courts won't tolerate this procedure
R. v. Weightman and Cunningham	trafficking			6 months	stay to avoid refusal to adjourn	stay before election	granted	would be vexatious to continue
R. v. Orysiuk	accepting bribes	5 years	intervening public inquiry			certiorari to quash informations and committal for trial	denied	no ulterior motive by the Crown

CASE NAME	CHARGE	PRE-CHARGE DELAY	REASONS FOR	POST-CHARGE DELAY	REASONS FOR	REMEDY SOUGHT	RESULT	REASON
Blomme v. R.	prostitution and keeping a bawdy house			1 year	unknown	certiorari quashing informations, prohibition as well	denied	time period insufficient to warrant a stay, defence agreed to some of the Crown adjournments
R. v. Hickey	break and enter			8 months in detention	unknown	stay	granted	Crown refused adjournment, withdraws and relays
R. v. Lizee	not given					Crown applications for mandamus	granted	only in exceptional circumstances can courts stay proceedings
R. v. Babcock	theft over $200.00					stay before arraignment and plea	denied	court has the power but here the facts did not warrant it
R. v. Loubier	s.234 and s.235 c.c.					Crown application for mandamus	granted	the court has no such power to stay proceedings

CASE NAME	CHARGE	PRE-CHARGE DELAY	REASONS FOR	POST-CHARGE DELAY	REASONS FOR	REMEDY SOUGHT	RESULT	REASON
Re Ball & The Queen	s.133(3) breach of probation (undertaking)					Crown appeal from probation order	appeal allowed	assumed the courts had the power to stay, but held facts did not warrant it
R. v. Pulla	assault					quashing conviction, certiorari	granted	court proceeding against accused while lawyer unavailable is abuse of process
Uyeyama v. Craig J. and A.G. of B.C.	robbery					prohibition	denied	no such power in inferior courts
Re Abitibi Paper Co. and R.	pollution					appeal by defendant from dismissal of application for prohibition	appeal allowed	Crown monitoring clean-up agreeing not to press charges but later doing so. Held abusive and courts can control matters civil in nature
R. v. Lebrun	impaired driving					appeal from dismissal of mandamus application	appeal dismissed	inferior courts have no power to stay

CASE NAME	CHARGE	PRE-CHARGE DELAY	REASONS FOR	POST-CHARGE DELAY	REASONS FOR	REMEDY SOUGHT	RESULT	REASON
Re Asselin and R.	corruption charges	between 10 and 16 years	long period of of study by commission of inquiry Crown proceeding against many			appeal from dismissal of stay application	denied	no malice on part of Crown and full answer and defense still possible
R. v. Schell	s.236 c.c.					prohibition	denied	held facts did not amount to an abuse of process
R. In Right of Alberta v. Krannenburg	s.236 c.c.					Crown appeal from prohibition order	denied	affirmed relaying of information may be an abuse of process
R. v. Foong	theft under, wilful damage	3 months	unknown. Also, charges withdrawn and relaid			stay	granted	the pre-charge delay, along with the very fact the matter was back in court, with the Crown failing to cite valid reasons why

CASE NAME	CHARGE	PRE-CHARGE DELAY	REASONS FOR	POST-CHARGE DELAY	REASONS FOR	REMEDY SOUGHT	RESULT	REASON
R. v. Billen	unlawful possession of an offensive weapon			charges withdrawn and relaid		stay	granted	found to be oppressive, vexatious and unfair
R. v. Anderson	robbery and others			deal made to stay some charges for pleas on others	later, new informations on same incident laid	stay	denied	accused, while losing right to serve time concurrently, the court will consider the totality of the sentences
R. v. Crneck, Bradley and Shelley	manslaughter					stay	granted	abuse of process found where Crown reneges on deal
R. v. Curlew	impaired driving			15 months, 4 Crown adjournments, accused consents to all		prohibition	denied	not an inordinate delay nor any prejudice to the accused

CASE NAME	CHARGE	PRE-CHARGE DELAY	REASONS FOR	POST-CHARGE DELAY	REASONS FOR	REMEDY SOUGHT	RESULT	REASON
R. v. Sim	fraud					stay	denied	court has the power, but no ulterior motive shown
Re Young et al. and The Queen	indecent assault			11 months, 9 adjournments	complainants not appearing, charges stayed and direct indictment laid, court not appearing	prohibition	denied	conduct not amounting to harrasment or unjust treatment
R. v. Maxner	speeding					Crown seeks overturning of a dismissal	granted	courts do not have the power and no evidence of abuse
R. v. Loustel	selling liquor to minors	10 days	Crown informing school			stay	denied	no ulterior motive
Re Regina and Allison	attempting to defeat the course of justice	4 1/2 years	accused admonished through police channels, then charged			Crown application for mandamus	granted	courts have no such power to stay

CASE NAME	CHARGE	PRE-CHARGE DELAY	REASONS FOR	POST-CHARGE DELAY	REASONS FOR	REMEDY SOUGHT	RESULT	REASON
R. v. Chabun	impaired and hit and run			Crown stays the charges, then relays, proceeding by indictment		prohibition and certiorari	denied	while court has the power to stay, facts did not warrant it
R. v. Sibley and Sibley	breach of trust and theft	2 1/2 years	unknown	1 3/4 years	acquittals and re-laying of new information	stay	denied	no malice or prejudice shown. Held where there is an earlier undiscovered delay, Crown has a particular onus to proceed with all reasonable haste

APPENDIX B

EUROPEAN CONVENTION JURISPRUDENCE ON REASONABLE TIME UNDER ARTICLES 5(3) AND 6(1)

CASE NAME	CHARGE	PRE-CHARGE DELAY	REASONS FOR	POST-CHARGE DELAY	REASONS FOR	VIOLATION	REASON
Lawless v. Ireland (No. 3)		5 months in detention without being charged	suspected as a terrorist			yes, Article 5(3)	act allowing detention without trial violated Article 5(3). However state had informed the authorities of the derogation of the Convention, which is permissable under the terms of the Convention
Wemhoff v. Germany	fraud			3 1/2 years in detention	complicated investigation, fear of suppression of evidence and failure to return if released	no, Article 5(3) no, Article 6(1)	complicated investigations, 169 bank accounts 56 banks, transactions totalling 776 million D.M., expert reports exceeding 1,500 pages, court records 10,000 pages contained in 45 volumes. Held government reasons for detention valid
Neumeister v. Austria	fraud			2 years 4 months in detention, in excess of 7 years for the trial	complicated investigation, 10,000 pages of court documents	yes, Article 5(3) no, Article 6(1)	government did little while accused awaited trial in detention and set bail at estimated value of the fraud. However court found state had proceeded expeditiously with the matter and had no criticisms

CASE NAME	CHARGE	PRE-CHARGE DELAY	REASONS FOR	POST-CHARGE DELAY	REASONS FOR	VIOLATION	REASON
Stogmuller v. Austria	fraud			5 year proceedings, 2 years in custody	fear of absconding and repetition of offense	yes, Article 5(3)	court held the fears unsubstantiated
Matznetter v. Austria	fraud			23 month detention	complicated fraud, numerous co-accuseds	no, Article 5(3) no, Article 6(1)	state justified delay, not due to preliminary investigations
Ringeisen v. Austria	fraud			22 months in detention		yes, Article 5(3), no, Article 6(1)	reasons for detention unsubstantiated, yet total time period not unreasonable
X. v. Germany #3637/68	fraud	3 1/2 years, 1 year, 8 months in detention	complicated investigations	14 months, 10 of these in detention	investigation complex, fear of absconding and suppressing evidence	no, Article 5(3), no, Article 6(1)	reasons for detention substantiated, matter proceeded expeditiously in the light of the circumstances. Also, while accused entitled to certain time consuming procedures, he must bear the consequences as to any resultant prolongation of the investigation

CASE NAME	CHARGE	PRE-CHARGE DELAY	REASONS FOR	POST-CHARGE DELAY	REASONS FOR	VIOLATION	REASON
Jentzsch v. Germany	war crimes			7 years, 4 months all in custody, trial taking 14 months	complex investigations, numerous witnesses from many countries, fear of absconding	no, Article 5(3), no, Article 6(1)	accusation serious, suspicion strong. Pre-trial detention not out of proportion to life sentence expected. Investigations complex and not unduly protracted
X. v. U.K. # 3868/68	burglary and robbery			11 weeks, 6 days in detention		no, Article 5(3), no, Article 6(1)	delay not unreasonable, failure to answer previous bail resulted in denial
X. v. U.K. # 4220/69	burglary and assaulting a police officer	14 days		15 weeks, 4 days		no, Article 5(1), no, Article 6(1)	accused was "brought promptly" before the competent judge
Kaiser v. Austria	theft			8 months before court decision written, affecting right to appeal. In total 2 1/2 years		no, Article 5(3), no, Article 6(1)	not unreasonable in circumstances

CASE NAME	CHARGE	PRE-CHARGE DELAY	REASONS FOR	POST-CHARGE DELAY	REASONS FOR	VIOLATION	REASON
Soltikow v. Germany				10 years, 3 months	complex proceedings	no, Article 5(3), no, Article 6(1)	state did not neglect the matter, and the delay was due primarily to "incalculable" complaints, submissions and applications by accused
Kamma v. Netherlands	extortion, attempted robbery			11 months in custody		no, Article 5(3), no, Article 6(1)	not unreasonable in circumstances
X. v. Austria # 5560/72				9 months detention from conviction to appeal		no, Article 5(3)	Article 5(3) does not apply after conviction
Berberich v. Germany	numerous terrorist charges			in excess of 3 years, 7 months in custody	extensive security measures, numerous judges, occasioned with numerous outbursts, hunger strikes and delay tactics by accused	no, Article 5(3), no, Article 6(1)	much of the delay caused by accused, and government did all it could to expedite matters

CASE NAME	CHARGE	PRE-CHARGE DELAY	REASONS FOR	POST-CHARGE DELAY	REASONS FOR	VIOLATION	REASON
Vampel v. Austria	murder			11 months in custody, a further 10 months to final appeal		Article 5(3) admitted by Commission	friendly settlement. Vampel was paralyzed after murder by a suicide attempt and pardoned. Obligatory detention in murder cases was also abolished
Huber v. Austria	tax fraud			12 years, 2 months, 18 days	complex situation, numerous co-accuseds and separations of charges, numerous judgments on points of law. Accused also left country for 14 months	no, Article 6(1)	Committee accepted application, but Ministers failed to garner 2/3 vote needed to declare a violation

CASE NAME	CHARGE	PRE-CHARGE DELAY	REASONS FOR	POST-CHARGE DELAY	REASONS FOR	VIOLATION	REASON
Hatti v. Germany	sexual assaults			in excess of 5 years in custody	psychiatrists, government, judges, prosecutors, and bureaucrats responsible for some delay. Accused needed numerous tests and numerous appeals by the accused	no, Article 6(1)	however regrettable delays, not unreasonable in the circumstances
Levy v. Germany				3 years, 10 months	delays caused equally by government and accused	no, Article 5(3)	not unreasonable in circumstances. Some delays could have been "practically" avoided by the accused and his lawyer

CASE NAME	CHARGE	PRE-CHARGE DELAY	REASONS FOR	POST-CHARGE DELAY	REASONS FOR	VIOLATION	REASON
Bocchieri v. Italy		1 year		4 years	Commission found no valid reasons for the delay	Commission accepted the application, but accused withdrew it	
Lynas v. Switzerland	forgery and extradition proceedings			3 years, 8 months in custody, with all but 3 months awaiting extradition	numerous appeals against extradition	no, Article 5(3)	5(3) does not apply to extradition proceedings
Haase v. Germany	treason			6 years, 4 1/2 in custody	numerous witnesses (78) with 3 1/2 month trial. Fear of absconding	no, Aritcle 5(3), no, Article 6(1)	Commission accepted application, but Ministers failed to garner 2/3 votes
Crociani v. Italy	accepting bribes			3 years	complex, 85 witnesses, many of foreign origin	no, Article 6(1)	no evidence of ommissions, delays or neglect by authorities

CASE NAME	CHARGE	PRE-CHARGE DELAY	REASONS FOR	POST-CHARGE DELAY	REASONS FOR	VIOLATION	REASON
Ventura v. Italy	related to terrorist attacks	3 years, 9 months in custody		3 years, 2 months in custody, remainder in forced residency on island. Trial taking 14 months and not completed at date of report		no, Article 5(3), no, Article 6(1)	not given
Eckel v. Germany	fraud charges			17 years, 3 weeks and 10 years, 4 months for two different proceedings. 5 years in custody	complex investigation	yes, Article 6(1)	while accused was uncooperative, the withdrawals and relaying of indictments, and the court delays were unreasonable

CASE NAME	CHARGE	PRE-CHARGE DELAY	REASONS FOR	POST-CHARGE DELAY	REASONS FOR	VIOLATION	REASON
X. v. Germany # 9604/81	murder	1 year, 1 month		still proceeding, in excess of 4 years in custody	complex proceedings, medical reports needed	no, Article 6(1), no, Article 5(3)	half his custody was while serving a sentence in an unrelated matter. Much of the delay was caused by the inaction of the Spanish government, which failed to supply evidence

APPENDIX C

UNITED STATES SUPREME COURT JURISPRUDENCE ON THE RIGHT TO A SPEEDY TRIAL

CASE NAME	CHARGE	PRE-CHARGE DELAY	REASONS FOR	POST-CHARGE DELAY	REASONS FOR	VIOLATION	REASON
U.S. v. Ewell	trafficking in narcotics			19 months	first conviction vacated, second trial	no (three justices dissented)	new indictments brought within limitation period government conduct not oppressive
Klopfer v. North Carolina	criminal trespass			in excess of 18 months	mistrial, two postponements and a nolle prosequi, similar to a stay	yes	the indefinite suspension of the prosecution, capable of being reinstituted at any time, violates the right
Smith v. Hooey	theft			in excess of 7 years	state not proceeding as accused a serving prisoner in a federal jail	yes	state has a duty to obtain accused and try him where he requests it
Dickey v. Florida	armed robbery			7 1/2 years	state not proceeding as accused a serving prisoner in a federal jail	yes	Dickey demanded a speedy trial and was prejudiced by the delay

CASE NAME	CHARGE	PRE-CHARGE DELAY	REASONS FOR	POST-CHARGE DELAY	REASONS FOR	VIOLATION	REASON
U.S. v. Marion	fraud	3 to 5 years on various charges	prosecutorial negligence on indifference			no (three justices dissented)	right does not begin to protect until putative defendant becomes an accused
Barker v. Wingo	murder			5 years	state postponing trial 16 times in order to try co-accused and have him testify against Barker	no	Barker consented to all but the #12, 15 and 16 continuances. Court held he had done so hoping his co-accused would be acquitted and that the state would drop his charges. Also, Barker could prove not prejudice
Dillingham v. U.S.	auto theft	22 months		1 year		yes (Chief Justice dissented)	cummulatively, period excessive. Accused's arrest started the speedy trial clock, and not the formal indictment
U.S. v. MacDonald	murder	28 months	government convenience and bureaucratic mismanagement			no (three justices dissented)	despite accused's cooperation to expedite matters, as well as no legitimate reason for long delay, right does not attach until state formally charges accused the preceeding military trial and acquittal did not start the speedy trial clock